COMMISSION ON A BILL OF RIGHTS

A UK Bill of Rights?

The Choice Before Us

Volume 1

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COMMISSION ON A BILL OF RIGHTS

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18 December 2012

On 18 March 2011 the Government announced to Parliament the establishment of a Commission on a Bill of Rights and invited me to become its Chair. Our terms of reference asked that we aim to report no later than by the end of 2012.

On behalf of the members of the Commission I now have pleasure in submitting our report.

Yours sincerely

Sir Leigh Lewis KCB
Chair

Terms of Reference

The Commission's terms of reference were:

> "[to] investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties.
>
> It will examine the operation and implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations and liberties.
>
> It should provide interim advice to the Government on the ongoing Interlaken process to reform the Strasbourg Court ahead of and following the UK's Chairmanship of the Council of Europe.
>
> It should consult, including with the public, judiciary and devolved administrations and legislatures, and aim to report no later than by the end of 2012."

Our Approach to Our Work

1. Many Government commissions bring together a group of varied individuals to investigate, by the consideration of evidence and of the views of respondents, a topic on which they have little previous opinion. This Commission is different. It has been composed, and we must presume deliberately composed, of people who already had well defined views on the protection of fundamental rights. Those well defined viewpoints come from many different places in the political spectrum.

2. Our Chair comes from a different, non-legal, background and, fittingly, brought no strong pre-conceived views to our work. But his extensive experience at senior level in Government has brought a further dimension to our deliberations.

3. Therefore, whilst we have all found our thinking influenced, and sometimes substantially altered, by the responses and discussions which we have had over the past 18 months, our deliberations have also involved an in depth exploration of each other's long-standing convictions. This has been a process of identification of underlying values and aspirations. A central purpose, as we have seen it, of the Government assembling so politically disparate a group to examine a topic characterised by so much misunderstanding has been to ascertain whether differences might be more apparent than real.

4. This dialogue both with respondents and between ourselves has revealed surprisingly wide areas of agreement. It has also allowed us to identify the roots of our intellectual and political differences. We have not attempted to talk each other out of deeply held beliefs: not only would such an attempt have been futile, but it would not have served what we have perceived as our underlying purpose. Our aim has not been to find a lowest common denominator compromise, but to release from the fog of political banalities shared fundamental convictions which we genuinely hold. Those commentators who assumed that we would simply rehearse our different philosophies and prejudices would have been sadly disappointed if they had sat through our discussions. Indeed this country’s debate on human rights would be far better served by a genuine attempt to find that on which most sensible people would agree than by the polarised and sometimes exaggerated polemic which too often tends to characterise the debate currently.

5. It is important to say at the outset that we have all interpreted our terms of reference as treating the UK's continuing adherence to the European Convention on Human Rights as a ‘given’. They speak of a Bill that "builds on all our obligations under the” Convention.

6. There are obligations on a state under the Convention only so long as that state remains a contracting party to the treaty: so the wording of our terms of reference

clearly, in our view, presupposes continuing adherence. Therefore, although during the period in which the Commission's work has been undertaken there have been a number of suggestions that the UK withdraw from the Convention, temporarily or permanently, we have not considered it to be within our scope to open that question. Accordingly, we do not in this report analyse arguments for and against the UK's continuing adherence to the Convention.

7. We have considered it to be an important part of our work to recognise the points at which there is a divergence of opinion, and identify the true source of that divergence. The most significant source of disagreement, albeit that it has important ramifications, is as to how creative a court should be: in particular, the issue arises in relation to the role and jurisprudence of the European Court of Human Rights in Strasbourg and of UK courts in interpreting and applying the Convention rights.

8. We are united in believing that there needs to be respect for the existence of differing intellectually coherent and valid viewpoints in relation to the human rights debate, and that the debate needs to be well informed and not distorted by the stereotypes and caricatures which have all too often characterised that debate in recent years. That is the fundamental approach that we ourselves have adopted in producing this report. It is also our first, agreed, conclusion.

A UK Bill of Rights? – The Choice Before Us

Overview

Introduction

1. Few subjects generate more strongly-held views than that of human rights. Scarcely a week passes without the appearance of headlines supporting or condemning the latest human rights court judgment. Successive governments are routinely accused by their opponents of ignoring or reducing the rights of individuals. High profile court cases involving potential extradition or deportation turn increasingly on whether the human rights of those facing such action will be infringed. The media, politicians, commentators, academics and lawyers queue up to deliver their views, at times in colourful language, on the latest human rights controversy. Small wonder that the first casualty of such polemic is all too often serious analysis of the issues.

2. Into such waters was this Commission launched. Its members, the Chair apart, were nominated in equal part by the two coalition parties. Those who read this, our report, will form their own judgments of our work and its usefulness. But one thing is certain. As we have set out in our introductory chapter on our approach, we have not been willing as members of the Commission to be stereotyped along pre-ordained lines. We have debated. We have argued. We have put forward our views. But we have also listened to one another. And we have been willing to change our views and set aside our earlier opinions.

3. Above all we have listened to those we have met, and we have read what those who wrote to us have said. We were determined at the outset that we should seek as wide a range of views from outside the Commission as possible and that we should draw on the wealth of experience that lay outside our doors. In this we believe we have succeeded. Well over a thousand organisations and individuals responded, substantively, to our two public consultations. We have met face to face as Commission members with well over one hundred bodies or individuals who asked to meet us or whom we asked to meet. We have held three major seminars for academics, lawyers, statutory and non-statutory bodies, and practitioners. We have spent time in Northern Ireland, Scotland and Wales to hear at first hand the views in those countries. We have benefitted greatly from the views of our Advisory Panel members from Scotland and Wales. Early on in our life we visited Strasbourg to learn more about the European Court of Human Rights and the challenges it faces. To the

best of our knowledge we have not declined to meet with anyone who asked to meet us.

4. We were also determined to be open in our work. We have throughout our existence published the minutes of our Commission meetings on our website. We have placed on the site copies of all the written submissions made to us in response to our two public consultations. We have published detailed notes or transcripts of some of our key discussions and of our seminars. We invited a number of major academic institutions, with expertise in our field of enquiry, to make available to us some of their best post-graduate students to help in our work and we have benefitted greatly from their research on our behalf. No one can ever say that there is no view we have not heard, nor opinion we have not canvassed. But overall we are confident that we have heard and understood the issues.

5. Against this background we wish to present our report to both the Government and, we hope, as a substantial contribution to public debate. This overview sets out both our main findings as to fact and our conclusions. It first sets out a brief background on human rights in the United Kingdom, and on the creation and subsequent development of the European Convention and Court of Human Rights, which is intended to help the general reader to place what follows in context. It next sets out a summary of the responses to our two consultations and of the views we have heard from the many organisations and individuals whom we met during our work. And it sets out finally the conclusions we have reached on the basis of our work. The overview is designed to be self-contained. But it is not intended to substitute for reading our full report which conveys our analysis and our conclusions in their entirety.

(i) Human Rights in the United Kingdom and Europe

6. The term ‘human rights’ began to come into common usage in this country and in Europe in the second half of the 20th century as the survivors of the appalling abuses of World War II sought to create instruments to prevent such abuses from ever taking place again. But the concept of ‘rights’ in the United Kingdom goes back almost to the very beginning of government as we now know it, to Magna Carta in 1215, the Petition of Right of 1628, the Bill of Rights in 1689 in England and the Claim of Right of 1689 in Scotland. The language of those instruments is very different from today’s but all had in common the premise that there needed to be some limits placed on the absolute power of those who ruled and some rights attaching to their subjects.

7. Alongside these statutes, over many centuries, what is known as the common law – a set of rules developed by the courts governing relationships between people, between people and property, and between people and government – developed many protections which would today be recognised as ‘rights’. These common law ‘rights’ included the right of those being brought before the courts to know the charges they

faced, to have the evidence against them made public, and to have the opportunity to challenge that evidence. Other common law 'rights' included the right not to be detained without charge and to be tried in public. Even at times when the safety of the Realm was in real and immediate danger, as during World War II, cases were brought and heard by the courts in which it was argued, as in the case of the internment of enemy aliens, that Government had breached such common law rights.

8. In many ways, therefore, the foundation on which today's human rights edifice rests is not the European Convention on Human Rights nor the Human Rights Act but an unbroken tradition going back at least some 800 years of both statute and common law providing protection against the arbitrary acts of those in power.

9. Against that background it is not altogether surprising that what is now called the European Convention on Human Rights had a great deal of its origin here in the United Kingdom. Indeed it was Winston Churchill who, in 1942, had called for "the enthronement of human rights" and in a speech to the Hague Congress, in 1948, had called for a Charter of Human Rights that would be "guarded by freedom and sustained by law." Following the creation of the Council of Europe in 1949, with the United Kingdom as one of its twelve original members, work on drafting such a Charter began heavily influenced by a seminal text produced during the Second World War by Hersch Lauterpacht, a Cambridge law professor and later the British judge on the International Court of Justice. The eventual European Convention on Human Rights, as finally adopted by the Council of Europe in August 1950, was largely based on an original draft produced by, amongst others, David Maxwell-Fyfe, a former Law Officer and later Home Secretary and Lord Chancellor in Conservative governments in the UK. The UK was the first of the original twelve Member States of the Council of Europe to ratify the Convention which it did in1951. The full text of the Convention is set out in volume two of our report.

10. At the start of its life in 1953 (although adopted in 1950 the Convention did not enter into force until some three years later) the Convention was different from today in a number of key respects, one of which was that cases could be brought under it involving the United Kingdom only by the member states which had ratified the Convention and not by individuals. While the Convention did provide for a right of individual petition this applied only where the Member State accepted that right. Initially only three countries – Ireland, Denmark and Sweden – did so and it was not until 1966 that the United Kingdom followed suit and not until 1998 that the right of individual petition became mandatory for all of the countries that had ratified the Convention.

11. Partly as a result the number of cases brought under the Convention in its early years was low and the number of decisions reached even lower. In the first decade of its life only some 2,400 cases were brought in total of which just 36 were found to be

'admissible' (i.e. meeting the tests set down in the Convention which determined whether they should be ruled upon). Of those 36 cases just two involved the UK.[1]

12. That position began to change, however, as more countries joined the Council of Europe and ratified the Convention and as more of them agreed to the right of individual petition. For a number of decades there was a relatively small but growing caseload at the Strasbourg Court. However in the early 1990s, when former Soviet bloc countries began joining the Council of Europe and ratifying the Convention, the number of cases brought to the Court rose steeply and, unsurprisingly, a backlog of cases began to emerge. By the end of the 1990s this had reached some 20,000.

13. To tackle the backlog a number of measures were introduced. In November 1998 the so called 'Protocol 11' introduced full-time judges along with a number of other reforms. Despite this the Court's backlog of cases continued to increase year by year reaching some 120,000 by 2005 and approaching 140,000 by 2010. A more fundamental set of reforms designed to address the growing backlog – Protocol 14 – was eventually introduced in 2010. The reforms included provision for a single judge, instead of three, to decide on clearly inadmissible cases and for a three judge committee instead of a seven judge Chamber to rule on cases where the case law was well established. Despite these – widely welcomed – measures the Court's backlog rose to over 160,000 cases, although it has now begun to fall as recent changes begin to have their effect. We return below to the advice which our Commission has given in relation to reform of the Court.

The Human Rights Act 1998

14. As already noted, it was not until 1966 that the United Kingdom allowed individuals to take cases of alleged infringement of their rights under the Convention to the Strasbourg Court. It was not always possible, however, for individuals to bring such cases directly in our own courts in the UK because the rights in the Convention had not been incorporated directly into UK domestic law. While such rights were frequently invoked in domestic court proceedings, and while the courts showed themselves increasingly willing to regard the Convention and its case law as sources of principle and public policy, it remained the case nevertheless that individuals could not seek direct redress for alleged infringements of their Convention rights in the UK's own courts.

15. That position shifted fundamentally with the passing of the Human Rights Act 1998. The Act, whose passage by Parliament had been preceded in 1997 by a White Paper from the new Labour Government *Rights Brought Home – The Human Rights Bill*, changed the law in a number of key respects. In particular the Act:

[1]Both were brought by the Government of Greece in the 1950s in relation to emergency measures employed by the then UK Government in Cyprus.

- required all legislation to be interpreted and given effect as far as possible compatibly with Convention rights; and

- made it unlawful for a public authority to act incompatibly with Convention rights and allowed for a case to be brought in a UK court or tribunal against the authority concerned if it did so.

16. Under the Act where a court finds that it is not possible to interpret subordinate legislation compatibly with Convention rights it may quash or dis-apply that legislation. It may not do so in respect of primary legislation but a higher court may in such cases make a 'declaration of incompatibility'. While such a declaration does not require the Government or Parliament to change the law in question it triggers a power that allows a Minister to amend the law by order to bring it into line with the Convention if the Government chooses to do so.

17. As a result of the Human Rights Act it became possible for the first time for alleged infringements of the rights in the European Convention on Human Rights to be brought directly before the UK's own courts. While the right of individual petition to the Strasbourg Court remains, such cases can in principle only be brought where the opportunity to secure remedies in the UK courts has been exhausted.

A UK Bill of Rights - a continuing debate

18. Perhaps inevitably there was a lull in the immediate aftermath of the passage of the Human Rights Act in the discussion of whether the Act should be seen as sufficient legislative underpinning of human rights in the UK or whether a further step, in the shape of a UK Bill of Rights, should be introduced either in addition to, or in substitution for, the Human Rights Act.

19. After a few years, however, proposals for a British or UK Bill of Rights began to resurface both from those who supported the Human Rights Act and from those who saw it as wanting in one or more respects. In 2006 David Cameron, following his election as leader of the Conservative Party, advocated replacing the Human Rights Act with "a modern British Bill of Rights to define the core values which give us our identity as a free nation." The Liberal Democrats reiterated their support for a written constitution which would include a Bill of Rights that continued to incorporate Convention rights into UK law. For its part the then Labour Government published a Green Paper in July 2007, *The Governance of Britain*, which proposed developing a British statement of values and a British Bill of Rights and Duties. In both this Green Paper and its subsequent 2009 Green Paper, *Rights and Responsibilities: developing our constitutional framework*, the then Labour Government said that the Human Rights Act had been an important first step, but that a fuller articulation of British values, while still incorporating Convention rights into UK law, would promote a stronger commitment to fundamental freedoms as well as providing "explicit recognition that human rights come with responsibilities."

20. In August 2008 the all party Joint Committee on Human Rights published a report *A Bill of Rights for the UK?* expressing the firm conclusion that the UK should adopt a Bill of Rights and Freedoms which should continue to incorporate Convention rights into UK law and which "should set out a shared vision of a desirable future society: it should be aspirational in nature as well as protecting those human rights which already exist."

21. In May 2010 the new Coalition Government announced as part of its Coalition programme that:

> "we will establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties."

22. In accordance with this commitment, though with the substitution of 'UK' for 'British', our Commission was established in March 2011 with a remit to report by the end of 2012.

(ii) The response to our consultations and discussions

23. It will be clear from this brief summary that the ground covered by our Commission has already been well trodden by many others. Nevertheless, while seeking to take full account of the views of those who have preceded us, we have sought to look at the issues anew. Events and circumstances change and we have sought to come to these issues with fresh eyes and, as already noted, without pre-determined conclusions. That applies particularly to our core mandate to investigate the creation of a UK Bill of Rights on which we have consulted twice during the lifetime of the Commission.

A UK Bill of Rights

24. In response to the Commission's first and second consultation papers, respondents set out a range of views in respect of a possible UK Bill of Rights. Many of these submissions were detailed and can not easily be reduced to a single view. Broadly speaking, however, amongst the range of responses received were that the existing Human Rights Act:

    a. should remain unchanged and continue to operate as at present;

    b. should be supplemented by a Bill of Rights for Northern Ireland;

    c. should be maintained and supplemented by a purely declaratory Bill of Rights or Bill of Rights and Responsibilities;

d. should be amended to include changes such as the addition of new rights and/or modifications of other provisions;

e. should be repealed and not replaced;

f. should be repealed and replaced by a UK Bill of Rights which could make a number of changes, such as restating Convention rights, adding new rights and/or modifying other provisions; or

g. should be repealed as part of a new constitutional settlement to include the enactment of an 'entrenched'[2] UK Bill of Rights.

25. Overall, of the respondents to our first consultation paper approximately a quarter advocated a UK Bill of Rights; just under half opposed such a Bill; with the remainder being neither clearly for nor against such a Bill. Responses to our second consultation were almost identical in terms of the proportions responding on this key question. In view of these responses we set out first the arguments which have been put to us against a Bill of Rights.

26. Of those opposed to such a Bill, around three quarters argued that, in their view, the UK already has a Bill of Rights, namely the Human Rights Act. The argument was put for example by JUSTICE who, in their response to our first consultation paper, said that:

> "the HRA 1998 satisfies the basic, core criteria which characterise all bills of rights: it represents a commitment to the human rights considered of particular importance to the UK; it binds the Government and can only be overridden with considerable difficulty. It provides an essential means of redress for violations of rights within the UK. It was described, on its introduction, as a 'bill of rights' for the UK."

27. Many of the respondents who shared this view argued that the Human Rights Act is already a legally enforceable Bill of Rights and that it is working well. Many also emphasised the positive aspects of the Act and set out their belief that the Act has been, and remains, an effective and sophisticated piece of legislation particularly as regards the power of the courts to make a declaration of incompatibility but not to strike down or dis-apply primary legislation. This was widely viewed by respondents as having struck a carefully crafted balance between the power of the courts and the ultimate sovereignty of Parliament.

[2] An 'entrenched' bill of rights or other constitutional instrument is typically one that cannot be repealed or amended by ordinary statute but rather requires special procedures or a special majority, such that it has the status of higher or supreme law.

28. Even amongst those respondents who had some reservations about the working of the Human Rights Act there was by no means universal support for a UK Bill of Rights. A significant number believed that, even if there were some flaws in the current state of human rights law in the UK, a UK Bill of Rights was not the answer because it would give rise to substantially more risks than benefits. In particular there was, and is, considerable suspicion amongst many respondents that the call for a UK Bill of Rights from some political parties and politicians is motivated by a desire to reduce existing human rights protection, and in particular to reduce the power of the European Court of Human Rights, rather than by any genuine belief in human rights. Such respondents are fearful that any UK Bill of Rights would be 'HRA (Human Rights Act) minus'. This view was put, for example, by the British Institute of Human Rights who said in response to our first consultation:

> "on the face of it this Bill of Rights debate may seem like an opportunity to call for the legal protection of a broader range of rights beyond those in the HRA but we have serious reservations that this is not what is on the table and, in fact, that human rights may be weakened. The focus on expanding the list of human rights which are protected may even (inadvertently) be at the expense of undermining the mechanisms for making those rights enforceable…This will be disastrous for all people, especially the most vulnerable members of our society."

29. It is important to note that not all of the arguments against a UK Bill of Rights come from those who applaud the current Human Rights Act. On the contrary some believe that the Act has caused expense, frivolous litigation and increased bureaucracy and are concerned that a UK Bill of Rights – irrespective of whether it was 'HRA plus' or 'HRA minus' – could only add to the confusion and create another layer of judge made law.

30. Moreover, these were, and are, by no means the only arguments against a UK Bill of Rights. Some respondents, in particular in Northern Ireland, Scotland and Wales, were also concerned that any attempt to introduce a UK Bill of Rights at this time could have adverse constitutional and political consequences for the UK, particularly if it were undertaken to the exclusion of a Bill of Rights for Northern Ireland or if it were undertaken without regard to the implications of the independence debate in Scotland. It was argued by many of these respondents and by many of those we met in Northern Ireland, Scotland and Wales that there was little or no call for a UK Bill of Rights from amongst their populations. It was also argued by some that the protection of rights was now at least as much a matter for the devolved legislatures as for the UK Parliament and that, as a result, the creation of a UK Bill of Rights would not only require the consent of the devolved legislatures but also that, depending on its scope, the devolved legislatures might seek to enact their own separate human rights instruments. The Scottish Government in their response to our first consultation said that:

> "if we considered it necessary (most obviously if the Human Rights Act were repealed) it would certainly be open to the Scottish Government to introduce Scotland-specific legislation to ensure that fundamental rights of people in Scotland are properly protected in the context of devolved responsibilities."

31. We return to these issues below.

32. There was also a strong strand in response to our consultations that even if there were, and are, problems or perceived problems with the Human Rights Act, or its adjudication by the courts, these have largely been caused by a lack of public education, and could be addressed accordingly. This view was expressed, for example, by Liberty, who said in response to our first consultation:

> "it is undeniable that there is a lack of public understanding and 'ownership' of the HRA. An almost complete absence of public education about the Act by the Government that introduced it has meant that for many years the human rights narrative has been one of real and imagined litigation as reported by mainly hostile media. It is disappointing that more was not done before, during or after the Act's enactment to explain its effect to the British public. This might well have encouraged greater understanding and cultural attachment to the legislation."

33. There are also some who believe that the whole notion of a UK Bill of Rights misses the key point which in their view is the need to restore Parliamentary sovereignty in the face of what they believe to be a European Court which has overreached itself in terms of many of its recent judgments. Some believe that the UK could champion human rights at home and abroad without being dependent upon the Strasbourg interpretation of those rights. It is also the case that some who share this perspective believe by contrast that a UK Bill of Rights would be a way of restoring sovereignty, at least to a degree, to this country's courts and Parliament.

34. Of those, albeit a minority, responding to our consultations who favoured a UK Bill of Rights, their arguments were about both substance and perception.

35. A number expressed the view that the Human Rights Act is perceived negatively, regardless of whether that perception is justified or warranted, and that its standing and status is thereby diminished. A related argument, advanced by a number of respondents, is that our existing human rights framework – based as they see it on the European Convention on Human Rights and on decisions reached by the Strasbourg Court – is widely regarded by the public as 'foreign' or European and therefore lacks both popular support and legitimacy. Both groups believe that a UK Bill of Rights would have far more democratic legitimacy and public support. For example, in their response to our first consultation the Society of Conservative Lawyers argued that:

> "a Convention which was intended to protect 'human rights and fundamental freedoms' has become associated instead in the public mind, not without some justification, with dubious compensation claims, complaints about the trivial, the protection of lawbreakers rather than the law abiding majority, a transfer of decision making on economic and social policy to judges and the enrichment of lawyers."

36. Many of those holding this view believe that a UK Bill of Rights could contain rights which better reflect the domestic heritage and legal culture of the UK. They believe that this would help both with public perceptions and feelings of ownership of their human rights, and it could also help ensure that the UK's Parliament and courts play the leading role in defining and interpreting these rights. They point to the fact that almost all of the other signatories to the European Convention on Human Rights have their own national instrument either in the form of a written constitution or a domestic bill of rights to which their courts routinely turn before considering in a particular case whether there may have been a breach of the Convention. They believe that the result is to make their populations less antagonistic to the European Court and Convention because far more cases are decided by reference to their own domestic law. They also believe that a UK Bill of Rights could, and should, be founded on the UK's own human rights heritage from Magna Carta, the Bill of Rights and Claim of Right in both England and Scotland forward. For example, in his response to our first consultation Professor Robert Blackburn, Professor of Constitutional Law at King's College, London, put forward the view that:

> "enacting a bill of rights will be an opportunity to articulate the indigenous traditions of our legal and political systems, the progressive values our society and people seek to espouse and a UK statement of our citizens' rights and freedoms more closely attuned to our national circumstances than those drafted for the international purposes of the European Convention on Human Rights as incorporated in the Human Rights Act 1998."

37. A second set of reasons advanced by some of those who favour a UK Bill of Rights is that such a Bill would be more effective than the Human Rights Act in protecting the rights of individuals. They believe that successive governments have introduced undesirable limitations on some traditionally held rights – such as the right to trial by jury and the right to have cases heard in open court – and that such rights would be bolstered and safeguarded if they were to be included in a Bill of Rights.

38. In parallel many, though by no means all, of those who favour a UK Bill of Rights do so in whole or in part because they would like it to contain additional rights to those in the European Convention. While there is no unanimity as to which these rights should be, amongst candidates advanced strongly by some of the respondents to our consultations were children's rights, rights for disabled people, equality rights,

environmental rights and socio-economic rights such as rights to healthcare and education. It is important to note also that some of those opposed to a UK Bill of Rights nevertheless argued strongly for some or all of these additional rights to be included if such a Bill were to be introduced despite their opposition to it in principle.

39. A number of those advocating a UK Bill of Rights did so in whole or in part because they believed it would offer the opportunity to include some reference to responsibilities as well as to rights in such a Bill. For example, in his response to our second consultation Dr Austen Morgan said that:

> "it is therefore time, I submit, to spell out again the contractual nature of the idea of society. It gives us rights. But each individual has a minimum duty, or responsibility, towards others."

40. Finally, some of those advocating a UK Bill of Rights did so because they believed it would give Parliament the opportunity to provide greater clarity and/or certainty about some aspects of the Human Rights Act such as the meaning of the requirement in the Act on UK courts to 'take into account' relevant Strasbourg jurisprudence or the balance to be struck between rights which may be in competition such as the right to privacy and the right to freedom of expression.

41. We give further detail below of responses to our consultation on a number of these issues.

Northern Ireland, Scotland and Wales

42. Our terms of reference also required us to consult, amongst others, with the devolved administrations and legislatures of the UK. As noted above, we have done so through, amongst other things, extended visits to Belfast, Edinburgh and Cardiff as well as by taking fully into account the representations made to us by the administrations and legislatures concerned. We have been very considerably assisted in this respect by our Advisory Panel members from Scotland and Wales to whom we owe a considerable debt of gratitude. It is a matter of regret that the devolved administration in Northern Ireland did not nominate Advisory Panel members who might well have similarly helped us.

43. It is fair to say that, at the start of our work, not all of us were fully seized of the implications of this aspect of our terms of reference. It rapidly became clear, however, from our visits and from the many conversations which we held that perceptions of the issues on which we are asked to advise, and indeed of our remit and legitimacy, were very different amongst many of those we met in Northern Ireland, Scotland and Wales than amongst some of those we met elsewhere. In particular, while polls suggest that the public throughout the UK in fact react very similarly to questions on human rights issues, the meetings that we had, particularly in Scotland and Wales, produced in general very little support for a UK Bill of Rights. Calls for a UK Bill of Rights were

generally perceived to be emanating from England only and there was little if any criticism of the European Court of Human Rights or of the Convention. By contrast, it was, and is, difficult to hear purely English views given the absence of an English, as opposed to a UK, political entity.

44. As noted above, doubt was also expressed by some of those we met in Scotland as to whether the Commission had a legitimate remit in respect of Scotland with some arguing that any changes to the current framework of human rights legislation as they might affect Scotland should be matters solely for the Scottish Government and Parliament to decide. Views in this respect were, in general, less pronounced in Wales but it was nevertheless clear that, in the wake of the recent extension of the Welsh devolution settlement, a UK Bill of Rights was not seen as being high on the public agenda and was seen by some as potentially posing risks to the public policy balances that Wales was achieving on its own.

45. In Northern Ireland discussion of a UK Bill of Rights was invariably linked to discussion of a separate Bill of Rights for Northern Ireland. The Belfast/Good Friday Agreement, signed in 1988, created a Northern Ireland Human Rights Commission and tasked it with submitting advice to the UK Government on a Bill of Rights for Northern Ireland. For reasons which are beyond the scope of this report no such Bill has yet been agreed or introduced. While some of those we met in Northern Ireland clearly saw our Commission as a vehicle for re-energising the debate over a Northern Ireland Bill of Rights, others believed that this was an issue that could only be resolved within Northern Ireland itself. Overall it was often difficult for Commission members to separate out views on the desirability, or otherwise, of a UK Bill of Rights on its own merits from the issue of a Bill of Rights for Northern Ireland.

The international landscape of human rights

46. Although not specifically required to do so by our terms of reference, we have also looked in some detail at the position regarding human rights law and structures in a number of other countries, both some that, like the UK, are also signatories to the European Convention on Human Rights and others, such as Australia and the United States, that self-evidently are not. We have done so because we wanted to be able to take account of relevant international experience in arriving at our own conclusions.

47. We set out in a later chapter of our report the position in a number of other countries. While each has structures and institutions that reflect its own history and tradition it is clear from this analysis that the UK remains almost unique in having neither a written constitution nor a Bill of Rights written to reflect its own circumstances. Even countries, such as New Zealand, which do not have a written constitution generally have a bill of rights, in New Zealand's case enacted in 1990. So far as we have been able to establish all other signatory states to the European Convention on Human Rights have either their own written constitutions or bills of rights. While practice

varies widely, it tends also to be the case that, as noted above, the courts in most such countries will determine cases of alleged human rights infringements by reference, at least in the first instance, to their own constitutional instruments rather than by reference to the European Convention. By contrast the primary question raised by claims made in the UK under the Human Rights Act is not whether there has been a violation of a Constitutional right, but whether there has been a violation of a right under the European Convention.

48. It is, of course, perfectly arguable that the UK's unusual position in this regard reflects our own unique heritage, including our common law tradition, and has served the UK well over many centuries. It has also been strongly argued, notably by members of the judiciary, that the UK courts should approach human rights issues by reference to the common law as well as the Convention and other legal sources. Nevertheless it does mean that the UK does not have a set of its own written constitutional rights against which alleged human rights violations can be judged.

What a UK Bill of Rights might look like

49. Unsurprisingly, given the background set out above, there have been a number of proposals both before and since the introduction of the 1998 Human Rights Act for a UK Bill of Rights accompanied by actual drafts of such a statute. In the early 1990s, for example, the Institute for Public Policy Research put forward a proposal for a written constitution including a Bill of Rights. More recently, the Joint Committee on Human Rights put forward such a draft as part of their 2008 report referred to above. These are important documents and we have included them as annexes to our own report so that readers can see examples of what a UK Bill of Rights might look like and contain.

50. Within our own Commission a number of members were keen to produce their own draft of such a Bill, not as the definitive text to which they, let alone the whole of the Commission, should be committed but as an illustration of their own thinking. The core of such a Bill is included in an individual paper in this report – drafted by Martin Howe – as a concrete example of what a Bill of Rights might look like in order to demonstrate what room there might be for expressing rights in terms reflecting the UK's constitutional history, clarifying their scope and adjusting their balance. In doing so we would wish to stress that this text is not put forward in any way as an agreed outcome of our Commission; indeed there are a number of aspects of it which some other members of the Commission find objectionable, in some cases strongly so. Nevertheless we do believe that, in weighing the analysis and conclusions in our report, it will be helpful for readers to be able to look at all these examples of what a Bill of Rights might comprise.

51. Similarly, though it would have been impractical to have included them all within our report, readers might well want to consider some of the Bills of Rights which are in

force in other countries and which exist either in their original English or in an English translation authorised by the country concerned. For ease of access we have included in our report a set of links through which some of these statutes can be accessed. While almost all tend to contain a broadly common set of what might be called the most fundamental rights – such as freedom of speech, freedom of religion and basic rights to individual liberty and justice – in other respects they differ quite widely reflecting, amongst other things, the history and culture of the countries concerned.

Additional rights

52. Of the 1,000 plus substantive respondents to our two consultations, some 300 specifically addressed the issue of whether any UK Bill of Rights should contain additional rights to those in the European Convention on Human Rights. Of these some 80% advocated such a Bill containing one or more additional rights. It is important to recognise, however, that somewhat over half of these respondents were either opposed to, or equivocal about, such a Bill in principle and were responding only against the contingency that such a Bill nevertheless went ahead.

53. The most frequently supported candidate put forward by those advocating additional rights was for a UK Bill of Rights to explicitly incorporate the rights in other international instruments – such as the United Nations Convention on the Rights of the Child – which the UK has signed but not incorporated into our domestic law. The next most strongly supported categories were, in order of preference, socio-economic rights (including in relation to the environment) and equality rights. Of those opposed to additional rights, concerns ranged from their potential cost to the practical difficulties associated with them, with some respondents simply stating that existing rights were sufficient.

The mechanisms of how any UK Bill of Rights should operate

54. In our second consultation we also asked a set of specific questions about how any UK Bill of Rights might work. The questions related to whether such a Bill should seek to guide the courts on how they should strike the balance between rights sometimes held to be in opposition to one another – such as the rights to privacy and freedom of expression; whether the existing definition of a public authority in the Human Rights Act should be changed; whether the mechanism in the Act enabling senior courts to make ‘a declaration of incompatibility’ (see paragraph 16 above) should be retained; and whether the existing requirement in the Act on UK courts to ‘take into account’ relevant judgments of the European Court of Human Rights should be modified.

55. Several hundred respondents took up our invitation to comment on one or more of these issues. Of those that did, the majority in each case, with one exception, were in favour of maintaining the position in the Human Rights Act. In particular, there was strong support amongst those responding on the specific issue of whether to modify the Act’s provisions in respect of a declaration of incompatibility for retaining the

status quo which, as noted above, was widely seen as striking a sensible balance between, on the one hand, the ultimate sovereignty of the UK Parliament and, on the other, the duty of the courts to declare and enforce the law. Of those responding on this issue some 60% wanted to leave the balance as it stands in the Human Rights Act with some 30% wishing to change it – the rest being unclear or unsure. Of those wanting to change the current balance two thirds wanted to do so in favour of the courts and one third in favour of Parliament. An illustration of the majority view that the balance should be left unchanged was put forward by the Law Society of England and Wales who said that:

> "the Law Society's position is that [declarations of incompatibility] are the best way to adjudicate human rights while still preserving the tradition of parliamentary sovereignty. If the courts were to be given power to strike down or suspend incompatible legislation, this would unsettle the UK's constitutional balance."

56. There was also a clear majority in favour of maintaining the requirement in the Human Rights Act on UK courts to 'take into account' relevant judgments of the European Court of Human Rights with three quarters of those responding on this issue wanting to maintain the current formulation. However, a number of those taking this view did so on the basis that our courts were now correctly interpreting the Act's wording in this respect having failed on some occasions to do so in the past. For example, JUSTICE said to us that:

> "there has been a longstanding debate on whether section 2 [of the Human Rights Act] requires our judges to be bound by the jurisprudence of the European Court of Human Rights. Although there is a clear line of case law which suggests our judges consider themselves so bound, there is nothing in the Human Rights Act 1998 which requires this approach…The judges themselves appear to be moving away from this unduly restrictive approach…Rightly we consider that the language in the Human Rights Act 1998 strikes an appropriate balance between respect for the boundaries of the Convention and encouragement of the development of independent domestic rights jurisprudence."

57. That said it is important to recognise that, while not in the majority amongst our respondents, there is a significant strand of opinion which believes that another option open to a Government which is discontented with the way in which the Human Rights Act has worked would be to amend the Act so as expressly to give Parliament and the courts in the UK more freedom to depart from Strasbourg Court rulings.

58. The one area where a number of respondents did wish to see a change to the position in the Human Rights Act was in respect of the definition of 'public authority' with a majority of those arguing for a change wanting to expand the definition to cover more of those companies or organisations that provide public services.

Responsibilities

59. As noted above, one of the reasons advanced by some, including a number of faith groups, in favour of a UK Bill of Rights was a wish to see it include, or at least refer to, the notion of responsibilities. A number of those taking this view argued that, at least for certain rights, the extent of the protection they provide should be determined at least in part by the actions of the individual seeking the protection of the right.

60. This was not, however, the majority view. Of those responding to a specific question in our second consultation paper on whether there should be a role for responsibilities in any UK Bill of Rights approximately 60% thought that there should not be. A number, such as Amnesty International, argued from first principles that:

> "Human Rights are universal and inalienable and belong to everyone."

61. Many of those taking this view argued that the guiding principle of human rights law is that fundamental human rights must be available to all persons and cannot be dependent on good behaviour, and that it is in the nature of the human condition that people sometimes break the law or act badly; the criminal law exists to punish criminal behaviour.

62. Others argued that there is already in fact recognition of responsibilities within the existing system. By way of illustration of this view the Howard League for Penal Reform commented that:

> "though rarely acknowledged in current debates, the notion of responsibilities is deeply embedded in the HRA. The HRA requires public authority decision makers (including the courts) to consider the rights and freedoms of others and the interests of the wider community when applying a wide range of rights. Human rights are not forfeited if someone does not respect the rights of others but the law does allow most human rights to be limited to protect the interests of others."

63. Some respondents saw both sides of the argument and searched for a middle ground. For example Canon Michael Hodge wrote that:

> "as a believing and practising Christian, I am concerned about 'Rights without Responsibilities' at least where a normal adult is concerned. The sight of people demanding 'Their Rights', without any apparent acknowledgement that those carry with them 'Their Responsibilities' worries me, to put it at its least. And yet I have real doubts as to how Responsibilities can have a place in law…What I should like to see is a kind of Highway Code. Certain rights are enshrined in law, but where the consequential responsibilities are spelt out in a Code of Good Practice."

(iii) Our conclusions

64. In turning now to the conclusions that we have reached as a result of our work we would want to make four, important, preliminary points:

● first, as noted in our introductory chapter, 'Our Approach to Our Work', we have all interpreted our terms of reference as clearly presupposing the UK's continuing adherence to the European Convention on Human Rights and to the European Court of Human Rights as a given. There are two necessary consequences which arise as a result. One is that there is no discussion in this report of whether the UK should consider any option other than continuing adherence to the Convention on the present basis: that would have been outside our terms of reference. The second is that the views we express, and conclusions we reach, assume this continuation. It is nevertheless the case that some of our members regret that the terms of reference were limited in this way and believe that this has excluded from the Commission's deliberations an important element of public debate. While, as outlined below, these members would have wished to have been free to have considered the merits of a UK Bill of Rights without this constraint the majority of members believe that a UK Bill of Rights should indeed only be considered on the basis set out in our terms of reference;

● secondly, while, despite our disparate political backgrounds we have found common ground on a wide range of topics, there is, however, one matter on which our views have differed sharply; namely the jurisprudence of the European Court of Human Rights. Some of our members consider that the Court has departed in a systematic way from the principles of international law, as expressed in the Vienna Convention on the Law of Treaties[3] which they believe ought to govern it. These members consider that the Court is, in effect, abusing its function and exceeding its jurisdiction by adopting interpretations of the Convention which its original signatories either expressly rejected or would not have been willing to accept. An individual paper drafted by two of our members – Jonathan Fisher and Edward Faulks – who do believe that the Court has indeed overreached itself in this way is included in this report. Some other members of the Commission fundamentally disagree with the views in this paper while others agree or disagree in part;

[3] The Vienna Convention on the Law of Treaties, adopted in 1969, is generally accepted as having codified the principles of customary international law on the formation, application and interpretation of treaties between states.

● thirdly, while we have paid very careful attention to everything that has been put to us, whether in writing or in our many meetings and discussions, we have not felt bound by the outcomes of those consultations in terms purely of numerical majorities. That is in part because we have not been able to gauge in any scientific way whether our respondents are representative of public opinion more generally and in part, more fundamentally, because we have in the end applied our own judgment to the key issues set within our terms of reference; and

● fourthly, we do not believe that our conclusions – whether unanimous or not – can, or should, be a final judgment on the issues which we have been asked to examine. That is not just for the obvious reasons that these are issues which, in the end, can only be decided by Government and Parliament. It is also because, as we set out below, we believe that there is a key question of whether a final decision on a UK Bill of Rights should only be made as part of a wider constitutional debate and public consultation.

65. For all of these reasons we put forward our conclusions as a contribution, although we believe an important one, to what we believe needs to be a continuing national debate. We commence by setting out our conclusions on the issue at the heart of our mandate; namely the creation of a UK Bill of Rights.

The results of our investigation into the creation of a UK Bill of Rights

66. A key difficulty in interpreting the range of views that we have received, as summarised above, both in favour of, and against, a UK Bill of Rights is that it is not always easy to disentangle in the opinions expressed to us what are tactical positions rather than fundamental beliefs. Thus some organisations that have in the past expressed considerable sympathy with the concept of a UK Bill of Rights are now more sceptical while others who now champion such a Bill appear to be motivated more by a desire to redraw the boundaries between our own courts and the European Court of Human Rights than by an attachment to extending human rights per se. Many of those putting forward their views self-evidently distrust the motives of others and have clearly tailored their own responses accordingly.

67. As members of the Commission we recognise this position. Nevertheless we have ourselves sought to address this key issue at least in the first instance from the first principle of what we think to be right. We believe that that is what both those who appointed us, and the wider public, would want and expect. As a minimum none of us considers that the idea of a UK Bill of Rights in principle should be finally rejected at this stage. We all consider that, at the least, it is an idea of potential value which deserves further exploration at an appropriate time and in an appropriate way.

68. At the same time there is no doubt that the arguments that have been put to us against a UK Bill of Rights are substantial. Perhaps the strongest argument, and certainly that advanced by the largest number of our respondents, is that the UK already has a bill of rights in the shape of the 1998 Human Rights Act. While individually some of us have reservations – in some cases serious ones – about the impact which the Act has had on public life and the cost of government, there is no doubt that the Act was, and is, a carefully drafted piece of legislation which has now been in place for approaching 15 years and which has had the capacity to engage with different legal systems. It is interesting that – the definition in the Act of a public authority apart – the majority of those responding to each of our questions in our second consultation paper on the mechanisms in the Act wanted to keep it as it stands.

69. In particular, the formula of the 'declaration of incompatibility', which allows a senior court to declare a piece of primary legislation passed by the UK Parliament to be incompatible with the European Convention but then leaves Parliament to decide whether and what action to take, has been widely seen as striking a sophisticated and sensible balance between Parliament and the courts – indeed one that has subsequently been adopted by a number of other common law jurisdictions. And there is now a view amongst some commentators that our courts have worked their way back to the position which they believe Parliament clearly originally intended that they should take into account, but not necessarily be bound by, the jurisprudence of the European Court of Human Rights in determining cases before them under the Act.

70. It is important at the same time to recognise that there is a fundamentally different kind of argument advanced by some against a UK Bill of Rights which is that a UK Bill of Rights would only add to the already existing tendency for any decision by any public authority with which some disagree to be challenged as an infringement of human rights no matter how well-founded or otherwise such arguments might be, or that it would inevitably lead to a further layer of expansive interpretations of the rights that such a Bill might contain. For example, there is clearly concern amongst some of those charged with enforcing immigration controls that the existing Human Rights Act and the Convention have been interpreted in ways which were never originally envisaged.

The constitutional dimension

71. A further set of arguments, to which some members attach considerable weight, is that any move at present to create a UK Bill of Rights risks, by accident or design, upsetting the current constitutional position of the UK at a particularly sensitive time. As noted earlier, a number of us were surprised by the strong degree of opposition which we encountered, particularly in Scotland but also in Wales and from some in Northern Ireland, to the idea of a UK Bill of Rights. This was put forward not only on the basis that there was simply no demand for such a measure in their respective

countries but also on the basis that this was no longer something which could be imposed by Westminster on the other countries of the UK. The Scottish Human Rights Commission wrote in response to our second consultation paper:

> "as the 'observation and implementation' of the ECHR has been devolved, the consent of the devolved nations in relation to any amendment to, or repeal of, the HRA and/or legislation enacting a bill of rights, covering the devolved jurisdictions, would be needed as a matter of constitutional convention."

72. Our Advisory Panel members from Wales commented in response to the same paper:

> "there is a separate question as to whether it is constitutionally and politically appropriate or desirable for matters affecting devolved legislatures in the exercise of their primary law-making powers to be determined by a UK Bill of Rights enacted by the Westminster Parliament rather than legislation enacted by the relevant devolved legislatures within the United Kingdom."

73. Against this background we are clear that any future debate on a UK Bill of Rights must be acutely sensitive to issues of devolution and, in the case of Scotland, to possible independence, and it must involve the devolved administrations.

74. Even during the lifetime of our Commission the debate over the future constitutional shape of the United Kingdom has moved on substantially. In particular, the recent agreement reached between the UK and Scottish Governments over an independence referendum for Scotland means that, in less than two years, it will be known whether Scotland has voted to remain within the union or to become independent. In this regard we also note the recent call by the Prime Minister for a Constitutional Convention following the referendum in Scotland. As a matter purely of practicality all of us believe that, while we would not want to see an inhibition on further discussion of the issues in the light of our report, it would be essential to await the outcome of the referendum before moving towards final decisions on the creation of a UK Bill of Rights for the obvious reason that it will only be after the referendum that the future composition of the UK will be known.

75. We are also acutely conscious of the sensitivities attached to discussion of a UK Bill of Rights in the context of Northern Ireland. In particular we recognise the distinctive Northern Ireland Bill of Rights process and its importance to the peace process in Northern Ireland. We do not wish to interfere in that process in any way nor for any of the conclusions that we reach to be interpreted or used in such a way as to interfere in, or delay, the Northern Ireland Bill of Rights process. It may, of course, be that by the time the outcome of the referendum in Scotland is known there may have been further progress towards a Bill of Rights for Northern Ireland under the terms of the Belfast/Good Friday Agreement.

76. More generally, we also recognise that any process of moving towards the creation of a UK Bill of Rights would have to be undertaken gradually, with full consultation, and with great care to avoid creating divisiveness and disharmony. To come to pass successfully a UK Bill of Rights would have to respect the different political and legal traditions within all of the countries of the UK, and to command public confidence beyond party politics and ideology. It would also, as a technical matter, involve reconsideration of the scheme of the devolution Acts, which limit the powers of the devolved legislatures and governments expressly by reference to respect for 'Convention rights'.

77. Whatever the outcome of the independence referendum in Scotland, it seems likely that there will subsequently be proposals for changes in the relationship of the nations that will then comprise the United Kingdom be that within a Constitutional Convention, as the Prime Minister has suggested, or in some other forum. Such a forum would be the most desirable place to consider the promotion of a UK Bill of Rights within the context of a wider constitutional review.

Our conclusions on a UK Bill of Rights

The conclusions of the majority of members

78. Having considered all of the issues and arguments as set out above a majority of the members of the Commission, including the Chair, believe that, on balance, there is a strong argument in favour of a UK Bill of Rights. Two members of the Commission – Helena Kennedy and Philippe Sands – do not share this view. Their conclusions on a UK Bill of Rights are set out at paragraph 88 below.

79. Those members holding the majority view note that the other 46 signatory states to the European Convention on Human Rights generally have their own written constitution, their own national bill of rights written in their own words or both. Indeed the UK is either alone or in a very small minority in not being in this position.

80. Arguably, in the view of these members, this would not greatly matter, other than as a piece of academic curiosity, if there were widespread public acceptance of the legitimacy of our current human rights structures, including of the roles of the Convention and the European Court of Human Rights. But they believe there is not. While polling on these issues is notoriously unreliable – with the answers given by the public depending heavily on the way in which questions are phrased (which is why the Commission did not commission any such polling itself) – these members note that even the most enthusiastic advocates of the UK's present human rights structures accept that, as Liberty said in its response to the Commission's first consultation paper, there is a lack of public understanding and 'ownership' of the Human Rights Act. If that is true of the Human Rights Act, these members believe that it is equally, if not even more, evident in relation to the European Convention on Human Rights and the European Court of Human Rights with the result that many people feel alienated

from a system that they regard as 'European' rather than British. In the view of these members it is this lack of 'ownership' by the public which is, in their view, the most powerful argument for a new constitutional instrument.

81. In the view of some respondents the appropriate response to any such lack of 'ownership' is for there to be increased public education on the benefits of the Act, and of the European Court and Convention. For example the British Institute of Human Rights in their response to our first consultation said:

> "rather than reinventing the wheel with a Bill of Rights, we believe the Commission should focus on recommending the need for an appropriate and accessible programme for public education on human rights and the HRA to show that the law works and is working well."

82. All of us believe that there is indeed a role for better public education and understanding of the present human rights structures and their effect – indeed we hope that our own report will be a contribution to that – but the majority of members find it hard to persuade themselves that public perceptions are likely to change in any substantial way as a result, particularly given the highly polemical way in which these issues tend to be presented by both some commentators and some sections of the media. It follows that most members believe that more of the same is likely to lead simply to more of the same; a highly polarised division of views between those for and against our current human rights structures. As Merris Amos, senior lecturer at Queen Mary, University of London, said in response to the Commission's first consultation:

> "on the assumption that a UK Bill of Rights will incorporate and build on all our obligations under the European Convention on Human Rights, ensure that these rights continue to be enshrined in UK law and protect and extend our liberties, I would support the creation of a UK Bill of Rights. Whilst the HRA has provided an important remedy for claimants and resulting in lasting and important legal changes, there remains very little knowledge about it amongst the general public and it continues to have a very poor public image and enjoys very little respect…In a recent poll commissioned by the human rights organisation, Liberty, 93% of respondents agreed that it is important 'that there is a law which protects rights and freedoms in Britain'. But this is not matched by support for the HRA…
>
> Whilst it might be possible to mend some of the problems with the HRA, others are now very difficult to unpick in particular the climate of disrespect surrounding it, created and perpetuated by political and public figures and the media."

83. Ms Amos goes on to argue that:

> "starting again with a UK Bill of Rights, containing identical or better human rights guarantees, might overcome these difficulties and create more of a sense of ownership amongst the general public."

84. In line with this view a majority of members believe that the present position is unlikely to be a stable one. Some of the voices both for and against the current structures are now so strident, and public debate so polarised, that there is a strong argument for a fresh beginning. The conclusion of a majority of the Commission's members is accordingly that the case has been made out in principle for a UK Bill of Rights protecting everyone within the jurisdiction of the UK. In accordance with the Commission's terms of reference this conclusion is put forward on the basis that such a Bill would incorporate and build on all of the UK's obligations under the European Convention on Human Rights. However, the wider constitutional and political dimension is also of crucial significance in considering the way forward towards the introduction of a Bill of Rights, and it is essential that it provides no less protection than is contained in the Human Rights Act and the devolution settlements, although some of us believe that it could usefully define more clearly the scope of some rights and adjust the balance between different rights.

85. For those members who support a UK Bill of Rights in principle on the basis set out above an important further reason (and for some of them a particularly compelling reason) in favour of such a Bill is that it would offer the opportunity to provide greater protection against the possible abuse of power by the state and its agents. In the final analysis, in the view of these members, decisions on the extent of the powers of the state must be for Parliament. But they believe that the experience to date of the Human Rights Act is that a statute expressly protecting basic rights and freedoms can provide a valuable safeguard against any such abuse of power.

86. A further issue for those members who support the principle of a UK Bill of Rights concerns the language in which its rights should be written. All are agreed that such a Bill should have at its core the rights currently in the European Convention on Human Rights including those Protocols which the United Kingdom has accepted. That does not necessarily mean, however, that they would have to be written in identical language. On the contrary given that for the members concerned the key argument is the need to create greater public ownership of a UK Bill of Rights than currently attaches to the Human Rights Act it would clearly in their view be desirable in principle if such a Bill was written in language which reflected the distinctive history and heritage of the countries within the United Kingdom.

87. Anthony Lester has set out his reasons for supporting the majority in an individual paper in this report.

The conclusions of the minority of members

88. As noted above, two members of the Commission – Helena Kennedy and Philippe Sands – do not share the view of the majority on this issue. Their conclusions on a UK Bill of Rights are as follows:

(i) We are pleased to join with our colleagues on important aspects of the Commission Report, in particular the recognition that this is not the right moment to embark on changes to the Human Rights Act: future developments should await the outcome of the Scottish referendum, after which a Constitutional Convention would be the most desirable place to consider these matters within the context of a wider constitutional review, allowing all parts of the United Kingdom to be involved in a suitable manner.

(ii) We are unable, however, to join our colleagues on one important issue, namely whether that future process should be focused on a new UK Bill of Rights. In our view, the moment is not ripe for such a conclusion, not least since the majority has failed to identify or declare any shortcomings in the Human Rights Act or its application by our courts. We consider that it would be preferable to leave open the possibility of a number of options that, without prioritisation, could be addressed by a future Constitutional Convention. These include maintaining the status quo, adopting a new and free-standing Bill of Rights, or moving to new constitutional arrangements that would incorporate and build upon the rights protected by the Human Rights Act.

(iii) We have approached our remit with an entirely open mind and appreciate very much the collegial and transparent nature of our deliberations. However, in the course of our work three factors have come to the fore in ways that are closely connected.

(iv) The first factor is *devolution*. It has become clear that the United Kingdom is in the process of significant change. Since the Commission was established, a date has been set for a referendum on Scottish independence, an event the outcome of which could have significant consequences for the whole of the United Kingdom. Even without this event, there are calls for greater autonomy as the UK moves incrementally towards a federal structure. We are greatly concerned that a premature move to a UK Bill of Rights would be contentious and possibly even dangerous, with unintended consequences, and that some members of the Commission have failed to acknowledge the full implications of the relationship between a possible UK Bill of Rights and the United Kingdom's other constitutional arrangements. Any Bill of Rights – and any proposals – would have to reflect the changing allocation of powers in the reconfiguration of the United Kingdom.

(v) The second factor we have been unable to ignore relates to the *views expressed in our consultations and work programme*. Whilst in the minority on the Commission, our views are aligned with the views of respondents to our two consultations, as this report recognises, in the sense of overwhelming support to retain the system established by the Human Rights Act (and very considerable opposition, for now at least, to the idea of a UK Bill of Rights). Moreover, it is abundantly clear that there is no 'ownership' issue in Northern Ireland, Wales and Scotland (or large parts of England), where the existing arrangements under the Human Rights Act and the European Convention on Human Rights are not merely tolerated but strongly supported.

(vi) The third factor concerns the view expressed in the course of our deliberations by a number of *our colleagues* on the Commission, to the effect that they would like the United Kingdom to withdraw from the European Convention on Human Rights (though we accept, equally, that others in the majority would join with us in envisaging no circumstances in which they would support such a move). This has alerted us to the real possibility that some people support a UK Bill of Rights as a path towards withdrawal from the European Convention. We would have been partially reassured if our colleagues had adopted a report that stuck faithfully to the Commission's clear terms of reference, which requires us to investigate a Bill of Rights that "incorporates and builds on all our obligations under the European Convention on Human Rights enshrined in British law." In our view, they have not done so and the failure to stick with the language as it is set out in our terms of reference represents a clear departure that is not accidental. We fear this is to satisfy those colleagues who oppose the continued incorporation of the Convention into UK law. This opens up the possibility that their conclusions, however tentative, will be used to decouple the United Kingdom from the European Convention on Human Rights. That is not a risk that we are willing to take, not least because of the United Kingdom's historical and continuing role in the life of the Convention and the promotion of the rule of law around the world.

(vii) Against this background, we consider that the case for a UK Bill of Rights has not been made, and that the arguments put to us against such a Bill remain more persuasive, at least for now. We remain open to the idea of a UK Bill of Right were we to be satisfied that it carried no risk of decoupling the UK from the Convention. Indeed, we fear that the single argument relied upon by the majority – the issue of public ownership of 'rights' – will be used to promote other aims, including the diminution of rights available to all people in our community, and a decoupling of the United Kingdom from the European Convention on Human Rights.

(viii) Our views on these and other matters in the report and its annexes, which do not diminish the collegiality of our deliberations, are set out in more detail in a separate paper in this report.

Other conclusions of the Commission

Additional Rights

89. One key question, if there were to be a UK Bill of Rights, is whether it should contain additional rights to those currently in the European Convention on Human Rights. As noted above, our consultations disclosed substantial support amongst those who responded in favour of one or more such rights being included in any such Bill of Rights. Entirely as was to be expected, organisations tended to favour rights which reflected their own purpose and mission.

90. We do not believe that it would be right for our Commission to reach firm conclusions in this respect both because in a number of areas we lack the expertise to do so and, more fundamentally, because we are not in any event agreed on whether the case for a UK Bill of Rights has been made.

91. We would, however, want to set out some principles which we think should be taken into account in this respect as part of any wider debate on whether to create a UK Bill of Rights:

- first, we do not oppose the concept of additional rights in principle. It is now over half a century since the European Convention on Human Rights was drafted and society has moved on very considerably in that period. If the Convention as a whole was being drafted from scratch today it would undoubtedly be a very different document from that which emerged in the early 1950s. So we think it entirely right that, were there to be a UK Bill of Rights, consideration should be given to whether it should contain rights in addition to those in the original Convention;

- secondly, we believe that amongst the additional rights which might be most readily considered in that eventuality are those which relate to people's fundamental rights to be treated equally irrespective, for example, of their innate characteristics such as their gender or ethnic origin. The most obvious candidate for inclusion would be the right to equality and non-discrimination currently enshrined in the Equality Act 2010, and in Protocol 12 of the European Convention on Human Rights which has not yet been ratified by the United Kingdom. That would, in our view, be

a natural extension of the rights that the Human Rights Act already protects;

- thirdly, and conversely, a majority of members believe that it is undesirable in principle to open up to decisions of the judiciary issues which are better left, in their view, to elected legislatures. In the view of these members what are termed 'socio-economic' rights – such as a right to health care or education – in practice often involve very difficult choices over the allocation of scarce resources. Similarly, in the view of a majority of members, 'environmental rights' would inevitably give rise in practice to very difficult choices between competing considerations and philosophies. All other things being equal a majority of members believe that such choices are better made by Parliaments rather than judges. Those members not taking this view believe by contrast that, as in other jurisdictions, socio-economic rights – for example in relation to health care and the environment – can in practice be drafted in such a way as to make them suitable for application by judges; these members note that the law in the United Kingdom and under the European Convention already recognises and gives practical effect to socio-economic rights, and this has not given rise to notable difficulties before the courts; and

- fourthly, while we believe strongly that there should be an irreducible core of rights available to everyone in the UK, we believe that it should be open to the devolved legislatures to legislate, within their devolved powers, for specific additional rights dealing with particular subject areas to be provided for in their jurisdictions if they so wished.

92. There is one other category of potential additional 'rights' that we would, however, want to be very carefully considered, as part of the process we have set out above, for inclusion in any possible UK Bill of Rights, namely a set of rights relating to our civil and criminal justice system. In our second consultation we asked specifically about a right to administrative justice, a right to trial by jury and other specific rights recognised by the common law in the field of criminal and civil justice. Because the issues in each case are complex we deal with them later in the body of this report rather than in this Overview. A right to trial by jury, for example, could only be considered if full account were taken of the differences between the English and Scottish legal systems in this respect. But, perhaps because we are all – our Chair apart – lifelong legal practitioners, we attach great importance to this category of potential rights. We all believe that there are a number of rights relating to our civil and criminal justice system that have come under threat from short term political pressures

under successive governments that we would like to see specifically included, and thus protected, if there were to be a UK Bill of Rights.

Other key provisions

93. As recorded in paragraphs 54 - 58 above we consulted widely on the mechanisms of how any UK Bill of Rights might operate. In general, as we have noted, respondents were in favour of maintaining the position in the Human Rights Act on these so-called 'mechanisms'. These included the specific issues of whether to modify the Act's provisions in respect of a declaration of incompatibility; whether to maintain the requirement in the Act on courts to "take into account" relevant judgments of the European Court of Human Rights; and whether to provide more specific guidance to the courts on how they should strike the balance between rights sometimes held to be in opposition to one another.

94. These are complex issues and each deserves serious consideration. One of our members, Anthony Speaight, has written a paper on these mechanisms, which is included in our report. While this is not presented as an agreed paper we put it forward as a thoughtful analysis of the position.

95. More generally, while we believe that there may be scope for some specific changes to the Human Rights Act position in respect of these mechanisms for the most part we conclude, in line with the majority of respondents, that the mechanisms in any UK Bill of Rights should be broadly similar to those in the Human Rights Act.

96. There is one such mechanism, however, on which we have a clear and settled view. Like the great majority of those who gave us their views on the specific issue of the existing formulation in the Human Rights Act on the ability of senior courts to issue declarations of incompatibility we think that the current formulation in the Human Rights Act strikes a sensible balance between, on the one hand, the ultimate sovereignty of the UK Parliament and, on the other, the duty of courts to declare and enforce the law. Our conclusion, if there were to be a UK Bill of Rights, is that it should contain a similar mechanism to that in the current Human Rights Act. We have found no appetite amongst respondents to our consultation, and have no appetite ourselves, for conferring on our courts a power to hold statutes enacted by Parliament not to be lawful (in technical terms 'to be not law') on the ground that, in the opinion of the court, they are incompatible with the rights in any such Bill.

97. The one area where we conclude that a case for change should certainly be considered is in respect of the definition of a 'public authority'. In line with a majority of those respondents who expressed a view on this issue, we conclude that the growing prevalence of the outsourcing of once traditional publicly provided functions to private and third sector providers means that the current definition should be looked at again if a UK Bill of Rights were to be taken forward.

Responsibilities

98. As noted above, the issue of whether there should be a role for responsibilities as a separate concept alongside rights has been frequently discussed in recent years. The previous Government consulted twice on this issue as part of a wider constitutional reform consultation process without arriving at firm conclusions. As part of our own consultations we were struck, at our Birmingham seminar, by the strength of feeling, particularly amongst the faith communities, that rights could not be discussed in isolation from responsibilities. While no one suggested, for example, that those accused of grave crimes should forfeit their right to a fair trial, or might in any circumstances be tortured, there was a clear view from the faith communities at the seminar that society depended on individuals fulfilling their responsibilities as well as exercising their rights.

99. Other respondents to our consultations – such as the Howard League for Penal Reform whose views we quote in part above – argued that responsibilities are in fact already baked into the fabric of our present human rights legislation not least by reference to many of the balancing tests in the European Convention itself. They note that there are very few absolute rights under the Convention and that both the Convention and the Human Rights Act already focus, correctly in their view, on the rights of others and the wider public interest. Others make the point that responsibilities are already embedded in our legal system by virtue of individuals who break the law being subject to punishment through the criminal justice system.

100. Having considered this very carefully our own conclusion is that it is in the nature of human rights that they exist for all human beings equally without reference to whether they are 'deserving' or not and that they cannot be made directly contingent on the behaviour of the individuals concerned. We thus do not believe, if there were to be a UK Bill of Rights, that the rights it contained should be made conditional upon the exercise of responsibilities. We do believe, however, that the formulation to be found in a number of the existing Articles in the European Convention on Human Rights whereby the rights in question are subject to such exceptions as are necessary in a democratic society for, amongst other things, the protection of the rights and freedoms of others, is one which should be emphasised in any UK Bill of Rights. We also believe, for reasons which are set out in the body of our report, that a UK Bill of Rights, if there were to be such a Bill, should contain a jurisdiction for a court to award damages but that this course should be discretionary and that in reaching such decisions the courts should be directed to take into account the conduct of the applicant.

101. This leaves open the question of whether, if there were to be a UK Bill of Rights, it should contain some form of declaratory provision, perhaps in a preamble, setting out the importance within our society of our mutual responsibilities to one another. For the reasons set out above it would be important to be clear that such a statement was

purely declaratory and not justiciable. But, subject to that, we conclude that if there were to be a UK Bill of Rights a declaratory (but non-justiciable) provision within it should certainly be considered as a means of attaching importance in a key constitutional instrument to the mutual ties and obligations on which society depends and of assisting its broad acceptance.

Reform of the European Court of Human Rights

102. At the time of our Commission's establishment in March 2011 the Government was only a short period away from assuming the rotating Chairmanship of the Council of Europe, and thus from taking responsibility for the ongoing reform process which the Member States of the Council had put in place, amongst other things, to tackle the growing backlog of cases before the European Court of Human Rights. The Government accordingly asked the Commission, through our terms of reference, to provide it with advice on the reform process both ahead of and following its Chairmanship of the Council of Europe.

103. We fulfilled that remit in part in September 2011 when we published our interim advice to the Government on the reform of the Strasbourg Court. In parallel we published a letter to Ministers which outlined other areas for potential reform which had either been raised with the Commission or by individual Commission members, but on which the Commission had not yet reached any conclusions. Both our interim advice and the parallel letter can be found in volume two of our report.

104. In our interim advice we highlighted the serious challenges created by the Strasbourg Court's ever growing caseload and urged the UK Government to pursue three areas of fundamental reform in order to achieve the well-being and effective functioning of the Court. These were:

- to reduce very significantly the number of cases that reach the Court by enhanced screening of cases and greater reliance on what is known as 'subsidiarity', thereby leaving the Court to address only cases raising serious questions affecting the interpretation or application of the Convention and serious issues of general importance;

- to reconsider the relief that the Court is able to offer by way of 'just satisfaction' and the extent to which the Court should be required to calculate the amount of financial compensation; and

- to enhance the procedures for the nomination and appointment of well-qualified judges of the Court.

105. In response the Government welcomed our advice and said that it would use it to inform its plans for its forthcoming Chairmanship of the Council of Europe. In the

event the UK Chairmanship culminated in a declaration adopted unanimously by the member states of the Council of Europe at a conference in Brighton in April 2012. The so called 'Brighton Declaration' called for:

- the Court to be able to concentrate on the most serious violations of human rights by amending the preamble to the Convention to include the principle of subsidiarity, as well as that known as 'the margin of appreciation', with the aim also of preventing the Court from accruing such a backlog of cases;

- the European Convention on Human Rights to be amended to tighten the admissibility criteria to achieve the same aims so that cases considered trivial could be excluded allowing the Court to focus on the most serious violations; and

- the continued refinement of the process for the selection of judges to the Court.

106. All of us applaud the efforts which were made by the Government in seeking to advance the pace of reform of the European Court during its chairmanship of the Council of Europe. We note that the Brighton Declaration was in a number of respects in accordance with our interim advice and we note that the most recent statistics published by the Court show that there has been a 5% decrease in the number of pending applications from the height of the Court's backlog in August 2011. Nevertheless, a number of the members of the Commission believe that the eventual Brighton Declaration did not secure the fundamental reforms of the Court which they believe are desirable. The paper by Jonathan Fisher and Edward Faulks referred to in paragraph 64 above sets out the perspective of these members some of whom also, as noted earlier, regret that the Commission's terms of reference have not enabled the Commission to explore the UK's continuing adherence, or otherwise, to the Convention.

107. In the view of other members of the Commission the Brighton Declaration was a useful step forward the full effects of which cannot yet be finally assessed. The view of these members is that the Commission's terms of reference quite rightly assume the UK's continuing adherence to the Convention.

108. That said, all of us continue to believe that more fundamental reforms of the Court, of the kind set out in our interim advice, are clearly required. In particular we continue to believe that:

    a. new screening mechanisms need to be introduced in order to reduce very significantly the number of cases that reach the Court;

b. there needs to be a reconsideration of the relief that the Court is able to offer by way of just satisfaction; and

c. the procedures for the selection of well-qualified judges of the Court need to be enhanced.

109. We therefore urge the UK Government to do everything possible to maintain the momentum of the Brighton Declaration and to continue to press for the fundamental reforms called for in our interim advice.

Resourcing, conclusion and thanks

110. Our Commission was provided by the Ministry of Justice with a total budget of £804,000. Our actual total expenditure in the course of our work has been approximately £700,000.

111. As noted at the outset this overview does not aim to reflect every aspect of our report and we express the hope that readers will read our report in full. We would also like to thank, once again, all of those very many organisations and individuals who took the trouble to give us their views, meet with us so that we could hear their opinions and in numerous other ways support our work. We would particularly like to thank, firstly, our graduate students, John Adenitire, Jamie Dunne, Alexandra Rose, Andrew Wheelhouse and Amy Williams, who carried out research on our behalf; and, secondly, Laura Draper, Adam Ferris, Xheni Krasniqi, Daniel Levy, Zoe McCallum and Ed Russell, who helped us to analyse the many responses we received to our public consultations.

112. Above all we would like to thank our Secretary, Andrea Wright, our Legal Adviser, Alison Presly, and the other members of our Secretariat, Iuliiana Best, Diane Caddle, Marie Colton, Mosun Hassan, Anthony Myers and Robin Seaton, for their dedicated and unstinting support to us all both individually and collectively. In an era when it can be fashionable to decry both public servants, and public service, it is a pleasure to be able to record the quite outstanding quality of their work.

Chapter 1: The Commission and its Work Programme

1.1 The Commission was established by the Coalition Government on 18 March 2011, following a commitment in the Coalition's Programme for Government.[4] Mark Harper MP, then Parliamentary Secretary for Political and Constitutional Reform, announced the Commission's terms of reference as follows:[5]

> "the Commission will investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties.
>
> It will examine the operation and implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations and liberties.
>
> It should provide interim advice to the Government on the ongoing Interlaken process to reform the Strasbourg Court ahead of and following the UK's Chairmanship of the Council of Europe.
>
> It should consult, including with the public, judiciary and devolved administrations and legislatures, and aim to report no later than by the end of 2012."

1.2 The members of the Commission were: Professor Sir David Edward KCMG, QC; Lord Faulks QC[6]; Jonathan Fisher QC; Martin Howe QC; Baroness Kennedy of The Shaws QC; Lord Lester of Herne Hill QC; Professor Philippe Sands QC; and Anthony Speaight QC. The Commission was chaired by Sir Leigh Lewis KCB.

1.3 The Commission held its first meeting on 6 May 2011. The Commission agreed from the outset that it would be important to ensure that its work was informed by the views of the UK public by seeking the views of a diverse range of individuals and organisations representative of a wide range of interests and backgrounds. In addition, the Commission agreed that it would be important to consider fully the implications of the devolution settlements and the views of the devolved administrations and legislatures. The Commission also agreed to establish a website to enable its work to be as widely available as possible. Minutes of all the

[4]Cabinet Office, *The Coalition: Our Programme for Government*, May 2010.
[5]HC Deb, 18 March 2011, col. 31WS.
[6]Lord Faulks QC replaced Dr Michael Pinto-Duschinsky who resigned from the Commission in March 2012.

Commission's meetings, as well as a number of other Commission papers, are available on the website: http://www.justice.gov.uk/about/cbr

Advice on reform of the European Court of Human Rights

1.4 At its first meeting, the Commission agreed to prioritise work on its interim advice on the reform of the European Court of Human Rights, given that the Commission had been asked to provide this advice ahead of the UK's Chairmanship of the Council of Europe which was due to start in November 2011.

1.5 As part of the process of developing its advice, all but one of the Commission's members travelled to Strasbourg on 4 and 5 July 2011 to meet with senior officials of the Council of Europe and the European Court of Human Rights, including the then President and President-elect of the Court. The Commission owes a considerable debt of gratitude to Ambassador Eleanor Fuller, the UK's then Permanent Representative to the Council of Europe, for hosting and facilitating the visit. For a list of those whom the Commission met in Strasbourg, please see volume two of this report. The Commission also discussed the issue of Court reform at its meetings in June and July 2011, and met with the UK Delegation to the Parliamentary Assembly of the Council of Europe.

1.6 The Commission published its advice to Government on reform of the European Court of Human Rights, as well as the accompanying Chair's Letter to the Deputy Prime Minister and the Secretary of State for Justice, in September 2011 (see volume two of this report). The advice and accompanying letter were made public by the Secretary of State for Justice in a Written Ministerial Statement on 8 September,[7] and published on the Commission's website on the same date.

Discussion Paper: Do we need a UK Bill of Rights?

1.7 In parallel to its work on the interim advice to Government on Court reform, the Commission began work on a paper to begin the process of consulting with the public on its mandate to investigate the creation of a UK Bill of Rights. On 5 August 2011, the Commission published a Discussion Paper, *Do we need a UK Bill of Rights?* and circulated it widely to elected representatives, members of the judiciary and interested organisations and individuals throughout the country. The Discussion Paper was also placed on the Commission's website and is included in volume two of this report. The Commission also published a Welsh translation and an Easy to Read version of the Discussion Paper.

1.8 The Discussion Paper asked four main questions as follows:

- do you think we need a UK Bill of Rights?

[7] HC Deb, 8 September 2011, col. 28WS.

If so,

- what do you think a UK Bill of Rights should contain?
- how do you think it should apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales?; and
- having regard to our terms of reference, are there any other views which you would like to put forward at this stage?

1.9 The Commission received over 900 responses to the Discussion Paper from members of the public, elected representatives, organisations and bodies, academics, barristers, solicitors, human rights practitioners and other individuals. The deadline for submissions was 11 November 2011, although the Commission continued to accept submissions after this date. All of the responses received can be viewed on the Commission's website.

1.10 These responses were extremely valuable to the Commission's deliberations. In particular, they helped to inform the Commission's subsequent discussions and its further work programme, and helped identify further, more detailed, areas of enquiry for the Commission's second consultation which it undertook approximately one year later (discussed below).

Meetings with individuals and organisations

1.11 As part of its objective of seeking as wide a set of views as possible the Chair and members of the Commission participated in well over 100 meetings with a wide variety of organisations and individuals during 2011 and 2012. These included meetings with elected representatives, senior judges, academics, individuals with senior operational experience and community and statutory bodies. In general if the Commission received a request for a meeting, the Chair and members endeavoured to attend and to reflect the views heard at subsequent Commission meetings. A complete list of individuals and organisations with whom the Commission met can be found in volume two of this report.

Northern Ireland, Scotland and Wales and the Advisory Panel

1.12 At its first meeting the Commission noted that in accordance with its terms of reference, it would be essential for members of the Commission to visit Northern Ireland, Scotland and Wales, and to consult as fully as possible with the devolved administrations and legislatures and with other stakeholders in those jurisdictions. This commitment built upon the mandate in the Commission's terms of reference that it "should consult, including with the public, judiciary and devolved administrations and legislatures."

1.13 The Commission gave extensive consideration to issues relating to Northern Ireland, Scotland and Wales, undertaking visits to Belfast, Cardiff and Edinburgh in the autumn of 2011 and devoting the Commission's January 2012 meeting to consideration of these issues. A list of the individuals and organisations that the Commission met in Belfast, Cardiff and Edinburgh is set out in volume two of this report.

1.14 The Commission was greatly assisted in its visits to Cardiff and Edinburgh, as well as in its deliberations on issues relating to Wales and Scotland by the Advisory Panel members appointed by the UK Government following recommendations from the Scottish and Welsh Governments. The Scottish Government nominated Professor Alan Miller, on behalf of the Scottish Human Rights Commission, and James Mure QC; the Welsh Government nominated Reverend Aled Edwards and Clive Lewis QC respectively. The Commission is very grateful to them for their assistance. The Northern Ireland Executive did not nominate any individuals to form part of the Advisory Panel. However, in planning the Commission's visit to Belfast, the Commission Secretariat and Members were greatly assisted by Professor Monica McWilliams, former Chief Commissioner of the Northern Ireland Human Rights Commission. The Commission would like to record its thanks to Professor McWilliams for her assistance.

Seminars

1.15 The Commission held three seminars in 2012, each themed around a different aspect of the Commission's investigation of a UK Bill of Rights.

1.16 The first seminar, on the topic "Do we need a UK Bill of Rights? If so, what should it contain?" was organised in conjunction with the Arts and Humanities Research Council, and took place on 23 February 2012 at the Royal Society in London. A list of participants is included in the List at Annex A of volume two of this report.

1.17 The second seminar, on the topic of Parliamentary sovereignty, was organised in conjunction with All Souls College, Oxford, and took place on 21 March 2012 at the College. A list of participants is included in the List at Annex A of volume two of this report.

1.18 The third seminar entitled 'Human Rights: Perception, Sentiment and Experience' took place with community representatives and practitioners on 13 June 2012 in Birmingham. A list of participants is included in the List at Annex A of volume two of this report.

1.19 A summary of the first two seminars and a transcript of the third can be found on the Commission's website.

Second consultation

1.20 On 11 July 2012, the Commission published a second Consultation Paper and again circulated it widely to elected representatives, members of the judiciary and interested organisations and individuals throughout the country. The Commission also published a Welsh translation and an Easy to Read version of the Consultation Paper.

1.21 The paper was published with the purpose of exploring the areas of further enquiry which the Commission had identified from the responses to its 2011 Discussion Paper. The consultation also sought to build on views and issues highlighted to the Commission on whether or not we needed a UK Bill of Rights; and if so, what the form and content of any such Bill might be. It asked 15 specific questions and also invited comment on any other issues related to the Commission's mandate.

1.22 The deadline for responses was 30 September 2012. The Commission received over 2000 responses which are available on the Commission's website. Of the total responses received, some 1800 were postcard responses prompted by two organisations: the British Institute of Human Rights and the Northern Ireland Human Rights Consortium.

Resourcing and website

1.23 The Commission was provided with a total budget by the Ministry of Justice of £804,000. The total sum actually spent in the course of its work was approximately £700,000.

1.24 As noted above, the Commission agreed at its first meeting to create a website. The website holds details in particular of the Commission's meetings, consultation programme and responses to its consultation. It can be found at: http://www.justice.gov.uk/about/cbr

1.25 Following publication of this report, the Commission's website will transfer to the National Archives, where it will continue to be accessible and searchable online.

Chapter 2: The Constitutional Background to our Inquiry

2.1 The United Kingdom constitutional context has necessarily influenced our inquiry and raises a number of challenges. In this chapter we set out the constitutional background to our work.

The UK's 'unwritten' constitution

2.2 Unlike almost all European and Commonwealth countries (other than New Zealand) the United Kingdom does not have a written supreme constitutional law, limiting the powers of the executive and legislative branches of government and the judiciary, and protecting fundamental rights.

2.3 Rather, the United Kingdom has developed over hundreds of years a largely unwritten constitution.[8] At its core, this divides power amongst the executive branch of Government at the central, devolved and local levels, the Parliamentary branch and the judicial branch. It has also established a system of government which is both monarchical and democratic; monarchical in that the head of state is the Queen, and democratic in that the people elect members of the House of Commons to represent them in Parliament at Westminster, which is the supreme law-making authority for the United Kingdom.

2.4 Under this system, it is for Parliament to make the law, for the executive to perform its functions according to law, and for the courts to interpret and apply the law.

2.5 However, while there is a strict separation between the judiciary and the other two branches of government,[9] there is a less strict separation between legislative and executive powers and functions. For example, Ministers by convention are both Members of Parliament and members of the Government. The Queen is also formally part of the legislative process to the extent that any bill requires Royal Assent before it becomes law. Where the Government has a majority in the House of Commons it ultimately has the power to legislate as it wishes, and the power to override the opposition of the House of Lords.

2.6 It is this dominance of the executive in the elected House of Parliament that led a former Lord Chancellor, Lord Hailsham of St. Marylebone, to describe the system as

[8] Many aspects of the UK's constitutional systems and principles are written down, but not all in one place, and not in a code which is entrenched, as constitutions generally are, in the sense that it has a supreme or higher status over ordinary law.

[9] The most senior judges used to sit as members of the House of Lords but since the Constitutional Reform Act 2005 they sit separately as members of the Supreme Court of the United Kingdom.

"an elected dictatorship."[10] Indeed it is the combination of this system and the UK's unwritten constitution which led the previous Government to note that:

> "in most modern democracies, the government's only powers are those granted by a written constitution or by the legislature. A distinguishing feature of the British constitution is the extent to which government continues to exercise a number of powers which were not granted to it by a written constitution, nor by Parliament, but are rather ancient prerogatives of the Crown. These powers have been accumulated by the government without Parliament or the people having a say." [11]

2.7 These 'Crown prerogatives' include powers to create and maintain Civil Service departments, the power to ratify treaties and the power to appoint and dismiss Ministers. Although the Constitutional Reform and Governance Act 2010 created a statutory basis for management of the Civil Service and introduced a statutory procedure for the ratification of treaties, it did not place other Crown prerogatives under statutory control. Nor did the Protection of Freedoms Act 2012, which set limits to a number of investigative and surveillance powers of the Government.

Parliamentary sovereignty and the rule of law

2.8 Within this overall framework lie two fundamental constitutional principles: the sovereignty of Parliament as the supreme legislative authority, and the rule of law as interpreted and applied by an independent judiciary.

2.9 The sovereignty of Parliament means that it cannot be bound by the acts of its predecessors, and equally cannot bind its successors;[12] and that the courts must give effect to the will of Parliament as expressed in the Acts of Parliament.

2.10 The rule of law, at its core, means that all individuals and authorities within the state, including Parliament and Government, are bound by and entitled to the benefit of law, as interpreted and applied by the courts.[13]

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[10] Lord Hailsham, The Richard Dimbleby Lecture, *The Listener*, 21 October 1976, pp. 496-500.

[11] *The Governance of Britain*, CM 7170, July 2007, para. 20.

[12] However, it is arguable whether the principle of Parliamentary sovereignty is endorsed throughout the UK. For example, it has been judicially stated as regards Scotland that "the principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law": the Lord President of the Court of Session in *MacCormick v. Lord Advocate* [1953] ScotCS CSIH 2.

[13] Bingham, *The Rule of Law* (London: Penguin Group, 2010), p. 37. Lord Bingham reviewed the ingredients of the general principle of the rule of law on the basis of the following propositions:

i. The law must be accessible and so far as possible intelligible, clear and predictable.
ii. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
iii. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.

2.11 These two constitutional principles themselves interact since the former essentially holds that Parliament is subject to the law, while the latter holds that Parliament is sovereign in making legislation. This interaction leads inevitably to debates about the extent to which Parliament's sovereignty is in fact absolute, and to what extent it is subject to limitations and qualifications.

2.12 For example, although the doctrine of Parliamentary sovereignty has traditionally meant that all laws are equal and that any act of Parliament can expressly or by implication repeal an earlier one, both Parliament and the courts have recognised that there are some constitutionally important statutes, such as the Human Rights Act 1998, which may be repealed or amended by future legislation only expressly or by necessary implication. That is, Parliament would either have to make explicit that its subsequent legislation was intended to repeal or amend the Act in question, or there would have to be no other conclusion reasonably capable of being drawn from the effect of the provision in question. The fact that the Human Rights Act, in particular, has been widely recognised as having this status is considered by many to be particularly important given that it sets out rights widely regarded as possessed by human beings prior to their recognition by a legal system, and which are sometimes described as natural or human or constitutional rights. In countries where such rights are recognised in a constitution which provides special protection against their curtailment, they are usually described as 'fundamental rights'. By contrast, while the UK – not having such a constitution – does not recognise any fundamental rights as such, and there thus remains, at least in theory, no legal limit to the extent to which Parliament can repeal or abolish rights that in other countries are regarded as 'fundamental', these rights are nevertheless protected at least to a degree by the common law doctrine described above.

2.13 The balance between Parliamentary sovereignty and the rule of law has also been affected by the development by the courts of judicial review and of modern principles of statutory interpretation. While our courts have more limited powers than in many other democracies, in the sense that they cannot simply nullify primary legislation that conflicts with fundamental rights in a constitution, they have in recent years placed greater emphasis through the means of judicial review on ensuring that public bodies acting under Parliamentary authority act lawfully, fairly and rationally and, where human rights are involved, in conformity with them. In parallel the European Court of Justice, in interpreting EU law, and the European Court of Human Rights, in

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iv. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers, and not unreasonably.
v. The law must afford adequate protection of fundamental human rights.
vi. Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.
vii. Adjudicative procedures provided by the state should be fair.
viii. The rule of law requires compliance by the state with its obligations in international law as in national law.

interpreting the European Convention on Human Rights, have developed the principle of proportionality, which requires that a measure pursues a legitimate aim and that the means used to meet that aim are appropriate and necessary.

2.14 Some senior judges and scholars have in recent years questioned the absolute nature of Parliamentary sovereignty.[14] For example, in an appeal concerning the ban on fox hunting, Lord Steyn suggested that "in exceptional circumstances involving an attempt to abolish judicial review or the authority of the courts, [the courts] may have to consider whether [parliamentary sovereignty] is a constitutional fundamental which even a complaisant House of Commons cannot abolish."[15] Lord Hope in the same case said "it is no longer right to say that [Parliament's] freedom to legislate 'admits of no qualification.'"[16] He continued that "the rule of law enforced by the courts is the controlling factor upon which our constitution is based."[17] Baroness Hale also in the same case said "(t)he Courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial powers."[18]

2.15 Such views have, however, been seen in many quarters as controversial. Lord Bingham, while expressing the hope "that the sovereignty of Parliament and its relationship with the rule of law may be seen as a matter worthy of consideration if, as I suggest, there are some rules which no government should be free to violate without legal restraint…" continued: "to substitute the sovereignty of a codified and entrenched Constitution for the sovereignty of Parliament is, however, a major constitutional change. It is one which should be made only if the British people, properly informed, choose to make it." [19]

2.16 The issue of entrenchment is discussed in an individual paper in this report drafted by Martin Howe QC.

International law

2.17 The rule of law also requires compliance by the UK Government with its obligations in international law as well as in national law. This effectively means that Parliament's

[14]See further, for example, Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009), pp. 310-36 and 411-16; Bradley, "The Sovereignty of Parliament – Form or Substance?", in Jowell and Oliver (eds.), *The Changing Constitution*, 7th ed. (Oxford: Oxford University Press, 2011), pp. 35- 69.

[15]*Jackson v. Her Majesty's Attorney General* [2005] UKHL 56, para. 102.

[16]Ibid., para. 104.

[17]Ibid., para. 109. In *AXA General Insurance Ltd v. Lord Advocate and others (Scotland)* [2011] UKSC 46, para. 51, Lord Hope repeated his words in *Jackson* saying that the rule of law enforced by the courts is "the controlling principle upon which our constitution is based."

[18]Ibid., para. 159.

[19]Bingham, *The Rule of Law* (London: Penguin Group, 2010), pp. 169-70.

law-making ability is constrained by the UK's obligation to comply with those international treaties which it has ratified.

2.18 While the UK must abide by its treaty obligations under international law, UK courts do not have jurisdiction to interpret and apply those treaty obligations which have not been incorporated into UK domestic law by legislation.[20] However, before the enactment of the Human Rights Act in 1998, courts in the UK became willing to have regard to the unincorporated Convention and its case law (as well as to other human rights treaties to which the UK is party, such as the International Covenant on Civil and Political Rights). They treated the human rights treaties as sources of principle, aids to statutory interpretation, and standards of public policy.

2.19 They did so, for example, where a statute was ambiguous or uncertain, or where the common law was incomplete, or as sources of legal public policy, or when determining the way in which judicial powers should be exercised. They have applied a presumption of conformity with fundamental rights where Parliament confers general statutory powers on Ministers and other public authorities.

2.20 The courts have acted on the presumption that Parliament does not intend to legislate in a way that violates the UK's treaty obligations. They have recognised in declaring the common law that there are constitutional rights that match Convention rights, including the right to be protected against retrospective or vague criminal laws, the right of access to justice, the right to freedom of speech, the right to respect for private life, home and correspondence, and the right to equal treatment without discrimination.

The European Convention on Human Rights, the devolution settlements and the Human Rights Act

2.21 For nearly 50 years from its entry into force in 1953, the European Convention on Human Rights was not incorporated into UK domestic law and therefore only figured in domestic jurisprudence in the ways described above. That is, it had the same status in the UK's courts as other unincorporated international obligations; domestic courts had no jurisdiction to interpret or apply the treaty; and the courts sought only to interpret and apply domestic law in conformity with the Convention to the extent possible and to the extent that there was room for ambiguity. Individuals who believed that their Convention rights had been breached could thus not bring a claim in domestic courts but rather had to petition the Strasbourg Court for a remedy.

2.22 This position changed when the Scotland, Northern Ireland and Government of Wales Acts, as well as the Human Rights Act 1998, came into force. The devolution

[20] *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (HL), at para. 500(c), *per* Lord Oliver of Aylmerton; *R v Lyons* [2002] UKHL 44.

legislation and the Human Rights Act gave direct effect to the UK's Convention obligations in domestic law and gave individuals the right to bring claims directly in UK courts. Public authorities throughout the UK are required to act in conformity with Convention rights, and the courts are required to read legislation of the UK Parliament "as far as it is possible to do so" in a way that is compatible with these rights. Where it is not possible to do so, the courts may issue a declaration to the effect that the legislation is incompatible with the Convention. Such a declaration of incompatibility leaves the legislation in full force, unless and until the Government and Parliament decide to amend or repeal its incompatible provisions. UK courts, in respect of claims under the Human Rights Act, do not have the power that courts in most other Commonwealth and European countries have to nullify primary legislation of the UK Parliament if they find it to be incompatible with the country's constitution or charter of fundamental rights. On the other hand, the courts do have that power with respect to acts of the devolved legislatures, which are "not law" insofar as they are incompatible with Convention rights (see below).

2.23 While the mechanism of the declaration of incompatibility was intended to give the UK Parliament the final say, some assert that Parliament's wishes are not in practice sovereign, since they are still subject to the UK's obligations under the European Convention on Human Rights as interpreted and applied by the European Court of Human Rights to abide by final judgments. Others take the view, by contrast, that this is in the nature of the UK's treaty obligations generally, and not just in the sphere of human rights.

Devolution

2.24 A further element of the constitutional background to our work is the UK's status as a unitary state in which power is held by a central government and Parliament which, while they can delegate power to other bodies, can equally withdraw such delegation. This contrasts with federal systems of governance in which sovereignty is shared between a central government and parliament and a number of state or provincial governments and parliaments.

2.25 In practice, however, considerable power has now been devolved from the UK Government and Parliament to the governments and legislatures of Northern Ireland, Scotland and Wales.[21] The nature and extent of the powers that have been devolved, such as control over education, health and local government, are wide-ranging and akin in many ways to the types of power that provinces or states have in federal systems. While the UK Government could in theory repeal the statutes which devolved these powers, it is increasingly arguable whether this is any longer a practical proposition.

[21]The Scotland Acts 1998 and 2012, the Northern Ireland Act 1998, and the Government of Wales Acts 1998 and 2006.

2.26 A further dimension of the devolution settlements with Northern Ireland, Scotland and Wales is the fact that the devolved governments and legislatures are prevented from legislating or acting in a way that would breach the UK's obligations under the European Convention on Human Rights. Specifically, since it is the UK that is bound by the Convention, the relevant devolution statutes provide that the devolved governments and legislatures have no authority to enact legislation or otherwise act in ways that would breach the UK's obligations under the Convention.[22]

2.27 A number of other considerations relating to the differences between the four countries that comprise the United Kingdom, as well as to the ties that bind them, including the distinct legal systems of some of the countries concerned within the United Kingdom, are important considerations in relation to the issues considered in this report and we return to them at greater length in chapter 6 below.

The UK's Crown Dependencies and Overseas Territories

2.28 A further feature of the UK's constitutional and human rights landscape is that it has three Crown Dependencies[23] and 14 Overseas Territories.[24] While these Dependencies and Territories are not formally a part of the United Kingdom, and generally have their own systems of governance and constitutions, the UK is responsible for their international relations and thus for their compliance with treaty obligations where the UK has extended an international treaty to the Crown Dependency or Overseas Territory in question.

2.29 Article 56 of the European Convention on Human Rights provides that a member state can extend the application of the Convention to any territories for whose international relations it is responsible, with due regard to local requirements. Under this provision, the UK has extended the application of the Convention to its three Crown Dependencies and 11 of its 14 Overseas Territories.[25] Individuals in the three Crown Dependencies and the 11 Overseas Territories also have a right of petition to the

[22]Scotland Act 1998, ss. 29(2) and 57(2), Northern Ireland Act 1998, ss. 6(2) and 24(1), and Government of Wales Act 2006, ss. 81(1), 94(6) and 108.

[23]These are the Bailiwick of Jersey, The Bailiwick of Guernsey, and the Isle of Man.

[24]These are: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, British Sovereign Base Areas of Cyprus, Falkland Islands, Gibraltar, Montserrat, St Helena, Ascension Island and Tristan da Cunha, South Georgia and the South Sandwich Islands, and Turks and Caicos Islands, British Antarctic Territory, British Indian Ocean Territory and Pitcairn Island.

[25]These are: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, British Sovereign Base Areas of Cyprus, Falkland Islands, Gibraltar, Montserrat, St Helena, Ascension Island and Tristan da Cunha, South Georgia and the South Sandwich Islands, and Turks and Caicos Islands. The remaining 3 territories have no settled populations, thus the UK has not extended the Convention to them: British Antarctic Territory, British Indian Ocean Territory and Pitcairn Island. Source: Declaration contained in a letter from the Permanent Representative of the UK to the Council of Europe, 19 November 2010, as cited on the Council of Europe website at http://www.conventions.coe.int/Treaty/Commun/print/ListeDeclarations.asp?NT=005&CM=&DF=&CL=ENG&VL=1.

European Court,[26] and it is the UK that is the Respondent in such petitions, rather than the respective local government.

2.30 The UK's Human Rights Act 1998 has no application in these dependencies and territories. The three Crown Dependencies of Jersey, Guernsey and the Isle of Man have their own human rights statutes which incorporate the Convention rights and thereby give individuals a right of recourse to their respective domestic courts in the case of an alleged breach of the Convention.[27] These statutes, and any amendments to them, are not valid unless they are passed by Order in Council in the UK. Overseas Territories have generally incorporated the Convention rights in their constitutions, which are scheduled to UK Orders in Council. These constitutions also generally provide a right of recourse to local courts in case of alleged breach.

2.31 Given the UK's constitutional relationship with its Crown Dependencies and Overseas Territories, in particular its responsibility for their compliance with Convention rights, and given the various instruments described above, it would be important for the UK Government and Parliament, if it introduced changes to the Human Rights Act 1998 or a UK Bill of Rights, to consider carefully any possible effects in the Crown Dependencies and Overseas Territories.

[26]For certain Overseas Territories, including Anguilla, Bermuda, Montserrat, British Virgin Islands, British Sovereign areas of Cyprus, St Helena and dependencies, Pitcairn and Turks and the Caicos Islands, the UK's acceptance of the right to individual petition is subject to renewal every five years. Source: Foreign and Commonwealth Office, information published 30 September 2009, as cited on the Foreign Office website at http://www.fco.gov.uk/resources/en/pdf/3706546/3892595/3892707/FCOOTHuman-Rights.

[27]These three statutes, respectively, are the Human Rights (Jersey) Law 2000, the Human Rights (Bailiwick of Guernsey) Law 2000 and the Isle of Man's Human Rights Act 2001.

Chapter 3: What is a Bill of Rights?

A brief historical and comparative background

3.1 The expression 'Bill of Rights' was first used in relation to a statute passed by the Parliament of England in 1689 setting out the conditions on which William of Orange and his wife Mary Stuart had been invited to assume the throne of England in place of King James II. It was used, one hundred years later, to refer to the first ten Amendments to the Constitution of the United States.

3.2 Nowadays, the expression 'Bill of Rights' is used to refer to a document, sometimes called a 'charter of rights', which has some degree of constitutional status, and which declares the fundamental rights of all people by virtue of their common humanity, or of particular categories of people, such as citizens or nationals of the country concerned.

3.3 These rights are variously described as basic, fundamental, inalienable, imprescriptible, inherent or natural rights; the rights of man; or, in a more limited context, constitutional rights. The expression 'human rights' appears to have been used for the first time in Tom Paine's translation of the French Declaration of the Rights of Man.[28] It came into general use after the Second World War.

3.4 The declaration of rights may take various forms. In some countries, it is a document separate from the Constitution (e.g. a Bill or Charter of Rights). This may or may not have the same legal status as the Constitution. In other countries, the statement of basic rights is set out in a separate chapter of the Constitution, while particular rights may also be affirmed at appropriate places within the body of the text.

3.5 The rights may be declared in a positive way ("everyone shall be entitled to …") or in a negative way ("no-one shall be subjected to…").

3.6 The declaration of rights may or may not be binding on the legislature and the executive, and the judiciary may or may not have power to declare invalid legislation or executive action that is incompatible with it.

3.7 The rights so declared may or may not be directly enforceable by the individual, and the individual may or may not be entitled to financial or other redress for violation of his or her rights.

3.8 In what follows, we offer a brief historical and comparative survey of the development of bills or charters of rights, first, in the UK and other countries of the 'common law'

[28]Paine, *The Rights of Man* (1791), p. 110. The original French expression *droits de l'homme* was, and was intended to be, gender specific.

tradition; and second, in other European countries. The survey does not pretend to be comprehensive or exhaustive,[29] but it will illustrate the various forms that a Bill of Rights may take.

3.9 The way in which, and the extent to which, the United Kingdom and other European countries have adopted and applied the European Convention on Human Rights in their domestic law is considered in chapter 5 of this Report.[30]

The United Kingdom and other countries of the common law tradition

England

3.10 The first general statement of rights in England was Magna Carta, the Great Charter of the Liberties of England, issued in 1215 and reissued several times in the thirteenth century and reconfirmed many times subsequently.[31] Only three clauses remain in force: Clause 1 confirming the liberties of the Church of England and of all Freemen of the Realm; Clause 9 confirming the liberties of the City of London and other cities, towns and ports; and Clause 29 which reads:

> "no Freeman shall be taken or imprisoned, or be disseised [unlawfully dispossessed] of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not [*sic*] pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either justice or Right."

3.11 In the course of the long series of disputes between Parliament and King Charles I, the Petition of Right (1628), which was accepted by the King, set out specific liberties of the subject, restricting non-Parliamentary taxation, forced billeting of soldiers, imprisonment without cause and the use of martial law.

3.12 The Habeas Corpus Act 1679 (following an earlier Act of 1640) defined and strengthened the ancient prerogative writ of habeas corpus which had been granted

[29] There are numerous comparative surveys of bills or charters of rights. For Africa, see e.g. Abdullahi Ahmed An-Na'im (ed.), *Human Rights under African Constitutions: Realizing the Promise for Ourselves* (Pennsylvania: University of Pennsylvania Press, 2002). For a historical perspective, including an overview of human rights protections in the Commonwealth Caribbean, see e.g. Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (Oxford: Oxford University Press, 2007). For Latin America, see e.g. Cleary, *The Struggle for Human Rights in Latin America* (Connecticut: Greenwood Press, 1997) and *Mobilizing for Human Rights in Latin America* (Virginia: Kumarian Press, 2007). For Asia, see e.g. Davis and Galligan (eds.), *Human Rights in Asia* (Cheltenham: Edward Elgar Publishing Ltd, 2011). For the Pacific, see e.g. Castellino and Keane, *Minority Rights in the Pacific Region: A Comparative Legal Analysis* (Oxford: Oxford University Press, 2009).

[30] For a wider-reaching analysis of the ways in which domestic arrangements interact with international human rights treaty obligations at a national level, see Alston (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Clarendon Press, 2000).

[31] The forerunner of Magna Carta, the Charter of Liberties of King Henry I (1100), was concerned with the treatment of clergy and nobles.

by the superior courts for about three centuries as a way of challenging unlawful detention. Although amended, it remains on the statute book. Further Habeas Corpus Acts have since been passed by the British Parliament.

3.13 In 1688,[32] after the flight from England of King James II, the Convention Parliament approved the Declaration of Right, which set out the reasons for which he was considered to have forfeited the throne, and William and Mary had been invited to assume it. Amongst the complaints against King James were that excessive bail had been required, excessive fines had been imposed, barbarous and unusual punishments had been inflicted, and the property of accused persons had been taken away before conviction.

3.14 Because the constitutionality of the Convention Parliament was open to question, the provisions of the Declaration of Right were restated with some amendments in the Bill of Rights of 1689 (An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown).[33] Its provisions were concerned mainly with the Protestant succession, the form of government and the limits of royal power but it repeated in slightly different words the provisions of the Declaration of Right as to excessive bail, excessive fines, illegal and cruel punishments, and the confiscation of property before conviction.

3.15 The Bill of Rights was followed by the Act of Settlement 1701 and has been treated as law, not only in the United Kingdom after the Union of 1707, but also in the American colonies before the Declaration of Independence and in other countries of the British Commonwealth. The Republic of Ireland has retained it, subject to some repeals.[34]

Scotland

3.16 The document analogous to Magna Carta in the history of Scotland is the Declaration of Arbroath 1320 – a petition to the Pope asking him to recognize the independence of Scotland under King Robert the Bruce, and to admonish the King of England to be satisfied with what belonged to him and leave the Scots in peace. The Declaration asserts the right of the people to choose their King, a claim that has a bearing on acceptance of the theory of the sovereignty of the UK Parliament. It does not contain any statement of individual rights.

3.17 In 1689, the Scottish Parliament passed an Act known as the Claim of Right. This differed from the English Bill of Rights in two principal respects.

[32]The date of the Declaration of Right and Bill of Rights is given as 1688 or 1699 depending on whether one is using the old calendar or the new.
[33]Ibid.
[34]Statute Law Revision Act 2007, s. 2(2)(a) and sch. 1, part 2.

3.18 First, the Bill of Rights proceeded on the assumption that King James II had abdicated the throne of England by leaving the country and taking refuge on the continent. This could not be said of his position as King James VII of Scotland. The Claim of Right asserted that he had forfeited his right to the Crown by invading the fundamental Constitution of the Kingdom, altering it from a legal limited monarchy to an arbitrary despotic power, violating the laws and liberties of the Kingdom. This can be interpreted as a reassertion of popular, rather than Parliamentary, sovereignty or at any rate of the ultimate supremacy of 'the law' rather than of the monarch or legislature.

3.19 Second, having enumerated the various ways in which James VII had violated the law, the Claim of Right reasserts a number of "ancient rights and liberties." In addition to those asserted in the Bill of Rights, it asserts that the following are "contrary to law": "imprisoning persons without expressing the reason thereof and delaying putting them to trial" and "sending letters to the courts of Justice ordaining the judges to stop or desist from determining causes or ordaining them how to proceed in causes depending before them."

3.20 Habeas corpus has never been part of the law of Scotland. However, in addition to the provisions of the Claim of Right referred to above, the Parliament of Scotland in 1701 passed an "Act preventing wrongous imprisonment and against undue delays in trials" (now known as the Criminal Procedure Act 1701). This introduced strict time limits upon detention without charge and further detention without bringing to trial. The High Court of Justiciary has an inherent power, known as the *nobile officium,* "to interfere in extraordinary circumstances, for the purpose of preventing injustice or oppression, although there may not be any judgment, conviction, or warrant brought under review."[35]

Wales

3.21 Wales had its own distinctive legal system until the death of Llywelyn Ein Llyw Olaf (The Last) in 1282. The Statute of Rhuddlan (1284) replaced Welsh criminal law with English law. By the measures of the Acts of Union (1536-1543), Wales was incorporated into the realm of England, the legal systems were unified, and the Welsh counties were given representation at Westminster.

3.22 Before 1282, Wales had a legal code known as the Law of Hywel Dda (Hywel the Good) which was (and is) perceived to have been more compassionate than medieval English law, particularly in relation to the rights of women, illegitimate children, and exiles.

[35]See *Wang Pin Nam v. Minister of Justice of German Federal Republic*, 1972 JC 43. For a discussion of habeas corpus in England, Scotland and Hanover, see the Opinions of Kennedy J and Scalia J in *Boumediene v. Bush* 533 US 723 (2008).

3.23 Following the Acts of Union, some distinctive legislation for Wales was passed, particularly in relation to the use of the Welsh language, forms of worship and the disestablishment of the Church in Wales. Unlike Scotland, Wales did not have a separate legal system.

Ireland

3.24 Ireland shared the common law tradition of England including the writ of habeas corpus and, until 1921, Ireland as a whole was subject to legislation of the Parliament of the United Kingdom. The Bill of Rights was treated as part of the law of Ireland and, as noted above, remains (with some changes) part of the law of the Republic of Ireland.

3.25 Following the partition of the island of Ireland in 1921, Northern Ireland remained (and remains) a separate legal jurisdiction within the United Kingdom with a separate Parliament at Stormont until it was abolished in 1973. There have been distinct developments in the field of human rights both before and after the Northern Ireland Act 1998 which gave effect to the current devolution settlement. These are discussed in greater detail in chapter 6.

3.26 In 1922, the Parliament of the Irish Free State adopted a new Constitution which contained a short Bill of Rights guaranteeing personal liberty (including the principles of habeas corpus); freedom from search; freedom of conscience and religion; the right to free expression of opinion; and the right to elementary education.

3.27 The Constitution of Ireland (Bunreacht na hÉireann) adopted in 1937, establishing a Republic,[36] contains a section entitled "Fundamental Rights" dealing with:

- Personal Rights (article 40);
    - Equality before the law (40.1);
    - Obligation of the state to respect, defend and vindicate the personal rights of the citizen (40.3);
        - Right to liberty including (in other terms) *habeas corpus*;
        - Inviolability of the dwelling (40.5);
        - Freedom of expression, assembly and association (40.6);
- Family (article 41);
- Education (article 42);
- Private Property (article 43); and
- Religion (article 44).

[36] Text available at: www.constitution.ie.

3.28 The Irish courts have relied on these provisions of the Constitution to declare Acts of the Oireachtas [Parliament] unconstitutional. Further, in interpreting article 40.3.1, they have developed a doctrine of unenumerated rights guaranteeing, for example, the right to bodily integrity, the right to health and the right to earn a livelihood.[37]

3.29 In addition to the fundamental rights set out in Articles 40-44, Article 45 of the Constitution sets out "Directive Principles of Social Policy." The application of these principles is expressly stated to be "the care of the Oireachtas [Parliament] exclusively, and shall not be cognizable by any court under any of the provisions of this Constitution."

3.30 In 2003, the Oireachtas passed the European Convention on Human Rights Act 2003, discussed further in chapter 5.

3.31 As we have noted above, the position in Northern Ireland is dealt with in chapter 6.

Virginia

3.32 In 1776, the Virginia Convention adopted the Virginia Declaration of Rights[38] as a document separate from the Constitution of Virginia. This was the first document that asserted, as a constitutional principle, that "all men are by nature equally free and independent and have certain inherent rights … which rights do pertain to them as the basis and foundation of government."[39] The Virginia Declaration influenced a number of later documents, including the United States Declaration of Independence (1776), the United States Bill of Rights and the French Declaration of the Rights of Man and of the Citizen (both 1789).

3.33 In addition to provisions asserting the sovereignty of the people, the equality of all citizens and the separation of powers, the Virginia Declaration proclaimed the right of the accused to be confronted with the accusers and witnesses and to a speedy trial; the privilege against self-incrimination; protection against cruel and unusual punishments and against baseless search and seizure; the right to jury trial; freedom of the press and freedom of religion; and protection against "being deprived of liberty except by the law of the land."[40]

The United States of America

3.34 The US Bill of Rights, consisting of the first ten Amendments to the US Constitution, is probably the best known of the documents known as a Bill of Rights. The need for,

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[37] See *Ryan v. Attorney General* [1965] IR 294; *Heeney v. Dublin Corporation* [1998] IESC 26; and *In Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.
[38] Text available at: http://www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html.
[39] Virginia Declaration of Rights 1776, s. 1.
[40] Ibid., s. 8.

and desirability of, a Bill of Rights was not generally accepted at the Constitutional Convention, and it was not included in the Constitution signed in 1787. Those who opposed a Bill of Rights did so principally on two grounds: first that a positive statement of rights would, by implication, exclude other rights guaranteed by the common law (on the principle inclusio unius exclusio alterius – inclusion of one excludes the other); and second, that the powers of the federal institutions were already sufficiently defined and limited by the Constitution and, as Hamilton put it, "why declare that things shall not be done which there is no power to do?"[41]

3.35 Madison, the primary author of the Constitution, recognized that a Bill of Rights would not necessarily be effective. As he wrote to Jefferson, "in Virginia, I have seen the Bill of Rights violated in every instance where it has been opposed to a popular current." However, he believed that it was necessary for one overriding reason:

> "wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents."[42]

3.36 Presenting the first Amendments to Congress, he said "the greatest danger lies … in the body of the people, operating by the majority against the minority."[43]

3.37 The Bill of Rights adopted by Congress in September 1789 contained 12 Articles, two of which were not ratified by a sufficient majority of states. To a considerable extent they reaffirm rights already recognized in the common law and in the various documents discussed above. With the exception of Article 6, setting out the rights of the accused, the rights are expressed negatively – as restrictions on the power to act in particular ways – rather than as positive rights. Article 9 provides that "the enumeration of certain rights shall not be construed to deny or disparage others retained by the people."[44]

Canada

3.38 Although the Canadian Bill of Rights was passed in 1960, it is the 1982 Canadian Charter of Rights and Freedoms[45] that is widely held to be the Bill of Rights for

[41] *Federalist Paper*, no. 84.
[42] Madison, Letter to Jefferson, 17 October 1788 in Hutchinson et al. eds., *The Papers of James Madison* (London: University of Chicago Press, 1962- 77), vol. 1, ch. 14, doc. 47.
[43] Madison, Speech in the House of Representatives, 8 June 1789 in Hutchinson et al. eds., *The Papers of James Madison* (London: University of Chicago Press, 1962- 77), vol. 1, ch. 14, doc. 50.
[44] Text available at: http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html.
[45] Text available at: http://laws-lois.justice.gc.ca/eng/Const/page-15.html.

Canada. The former is an ordinary statute that applies only to legislation by the central Government whereas the latter applies to legislation and governmental action at both the central and provincial levels. The Charter also forms part of Canada's entrenched constitution and can therefore only be amended by special procedures set out in the Constitution Act 1982. The Charter was passed as part of the 'patriation' of Canada's constitution from the – by then purely formal – control of the Westminster Parliament to the Canadian federal and provincial legislatures.

3.39 The Charter of Rights and Freedoms contains fundamental freedoms including freedom of expression and religion, democratic rights such as the right to vote, rights against actions such as arbitrary detention, equality rights, mobility rights for citizens, language rights, and rights for the aboriginal peoples of Canada. There are also commitments by the central and provincial governments, without altering their legislative authority or rights, to further economic development and provide essential services of reasonable quality.

3.40 The Charter also contains a special provision to strike a balance between Canadian legislatures and Canadian courts. Any of the central or provincial governments can pass a law "notwithstanding" the Charter. This means that if a court declares a law null and void because it is incompatible with the Charter, the Government can pass the law again, so long as it expressly declares that the law will operated notwithstanding the Charter. However this provision can only be applied in respect of certain provisions of the Charter. For example, the governments cannot override democratic rights such as the right to vote or language rights.

3.41 In addition to the Canadian Bill of Rights and the Charter of Rights and Freedoms, instruments have been passed by both the federal government and the provincial and devolved territorial legislatures of Canada. In some cases these are bills of rights that set out various fundamental rights. In other cases, such as the Canadian Human Rights Act and the Ontario Human Rights Code, these are essentially anti-discrimination statutes though with 'quasi-constitutional' status.

New Zealand

3.42 Having considered proposals in the 1980s for an entrenched Bill of Rights modelled on the Canadian Charter of Rights and Freedoms 1982,[46] the New Zealand Government enacted the more modest New Zealand Bill of Rights Act in 1990.[47] After a protracted debate, and with limited support from the Opposition, the Act is closer to the unentrenched Canadian Bill of Rights of 1960.

[46]White Paper, *A Bill of Rights for New Zealand*, 1985.
[47]Text available at: http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html.

3.43 The stated purpose of the Act is to reaffirm New Zealand's commitment to the International Covenant on Civil and Political Rights and to "affirm, protect and promote human rights and fundamental freedoms in New Zealand" in respect of all individuals within the country's jurisdiction. The Bill of Rights applies to the acts of the executive, legislature and judiciary and any body carrying out any "public function, power or duty" in statute.

3.44 Part 2 of the Act sets out a relatively limited range of civil and political rights relating to life and security of the person; democratic and civil rights; non-discrimination and minority rights; and search, arrest and detention.

3.45 The Act was passed as an ordinary statute and thus does not enjoy any enhanced status within New Zealand's otherwise uncodified constitution – indeed, section 4 expressly denies the Bill of Rights' supremacy over other legislation. The Act may thus be amended or, theoretically, repealed by a simple majority vote of MPs.

Australia

3.46 Despite a written constitution that dates back to 1901, Australia does not have an Australia-wide Bill of Rights. The Commonwealth of Australia Constitution Act 1960[48] sets out a very limited number of rights, though a number of provisions have been held to confer certain rights, such as a right to compensation in the compulsory acquisition of property, a guarantee of trial by jury on indictment, a right to vote, and a prohibition on the establishment of a national religion. Those provisions limit the scope of the Commonwealth Parliament, but do not affect state legislatures.

3.47 In recent years, the Australian Government has rejected proposals for a national human rights instrument, but two of Australia's states – the Australian Capital Territory and the state of Victoria – have adopted their own local instruments. Other states have been considering their own human rights frameworks. It is worth nothing that although there is no Australia-wide Bill of Rights, there is a statutory Parliamentary Joint Committee on Human Rights which carries out functions similar to the UK's Joint Committee on Human Rights (discussed in chapter 6 of this report) including examining bills and statutes for their compatibility with human rights, as contained in international instruments.[49]

[48]Text Available at: http://www.comlaw.gov.au/Details/C2004C00469.

[49]Human Rights (Parliamentary Scrutiny) Act (Australia) 2011, ss. 3 and 7. The Act specifically refers to the International Convention on the Elimination of all Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities. Text available at: http://www.comlaw.gov.au/Details/C2011A00186.

Australian Capital Territory

3.48 Arising in part from the debate at the national level about human rights protection, the Australian Capital Territory passed the Australian Capital Territory Human Rights Act in 2004 following extensive community consultation starting in 2002.[50]

3.49 The stated purpose of the Act is to ensure that human rights are taken into account when developing or interpreting legislation within the Australian Capital Territory and, ultimately, to promote understanding of human rights within the territory and cultural change in public services.

3.50 The Act contains a broad range of civil and political rights drawn from the International Covenant on Civil and Political Rights familiar to the European Convention on Human Rights, including rights relating to: recognition and equality before the law; the right to life and protection from torture and cruel, inhuman or degrading treatment; protection of the family and children, privacy and reputation. It also contains additional rights, such as those for children in the criminal process and rights of minorities.

3.51 On its introduction, the Government must provide an assessment of proposed legislation in a compatibility statement (section 37 of the 2004 Act). A right may be limited where any reasonable limits "can be demonstrably justified in a free and democratic society." The circumstances in which rights may be reasonably limited are elaborated further through a list of relevant factors that must be considered, including:

a) the nature of the right affected;

b) the importance of the purpose of the limitation;

c) the nature and extent of the limitation;

d) the relationship between the limitation and its purpose; and

e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

3.52 The 2004 Act was passed as an ordinary statute and thus may be amended through a majority vote in the Australian Capital Territory legislative assembly. The Australian Capital Territory Supreme Court may issue a declaration of incompatibility if a law is not consistent with a right in the 2004 Act. The validity of the law in question is not affected, but the Attorney General must submit a written response to the declaration to the legislative assembly outlining how the Government intends to remedy the situation.

[50] Text available at: http://www.legislation.act.gov.au/images/pdfa.gif.

Victoria

3.53 As part of a review of the Victorian justice system, and after considerable public consultation, Victoria enacted the Victorian Charter of Human Rights and Responsibilities in 2006 as an ordinary statute.[51] Whilst the Act may be amended by a majority vote, it is commonly held to have codified a common set of values and principles, which would be difficult to alter.

3.54 The aim of the Act was to promote cultural change so that regard for rights and responsibilities would be embedded in public policy-making and the provision of public services so as to prevent human rights issues from arising. Unlike the Australian Capital Territory instrument, the Victorian Charter explicitly provides that the Government or any body discharging public functions acts unlawfully if it fails to give effect to the Charter rights.

3.55 The Charter includes a broad range of civil and political rights drawn from the International Covenant on Civil and Political Rights and familiar in the European Convention on Human Rights, including provisions relating to: the right to life; protection from torture and cruel, inhuman or degrading treatment; freedom from forced work; privacy and reputation; freedom of expression; fair hearing and rights in criminal proceedings. In addition, building on its preamble which sets out the cultural context in which it was drawn up, the Charter sets out social, cultural and economic rights and rights for certain groups such as children and Aboriginal people.

3.56 Section 7 of the Act sets out similar limitations as the Australian Capital Territory 2004 Act above, but also provides that:

> "nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person."

3.57 The Charter expressly empowers the Parliament of Victoria to act incompatibly with – or to override – the rights in the Charter (section 31). Although all bills introduced to the Parliament must be accompanied by reasoned Ministerial statements of compatibility, the Parliament may declare that an Act or provision "has effect despite being incompatible with one or more of the human rights … in this Charter" for renewable periods of five years.

3.58 The Supreme Court of Victoria may issue a 'declaration of inconsistent interpretation' where it assesses that legislation cannot be interpreted in a way that is consistent with a Charter right. This is a deliberate departure from the 'declaration of incompatibility' found in the UK Human Rights Act and elsewhere to maintain Parliamentary sovereignty and to underline that the Supreme Court of Victoria is limited to

[51] Text available at: http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubLawToday.nsf/imgPDF.

highlighting differences in interpretation of legislation, rather than bringing into question the validity of the legislation.

South Africa

3.59 The Constitution of South Africa 1996 contains a Bill of Rights[52] (in chapter 2) which applies to the executive, legislative and judicial branches of the South African Government. Some provisions – such as unfair discrimination – also apply more widely to private persons and the courts are required to develop the common law in a compatible manner between private parties.

3.60 In 1993, after the end of Apartheid, a Government of National Unity was set up under an interim constitution that protected a limited number of so-called negative rights (largely relating to civil and political rights) and provided that an elected constitutional Assembly should draft a final constitution and Bill of Rights within two years and with wide consultation. There was a particular emphasis on ensuring the Constitution was "legitimate, credible and accepted by all South Africans" after the painful experiences of apartheid.

3.61 The final text was signed by President Mandela in 1996 and came into force in 1997. The Bill of Rights contains civil and political rights, including: the right to equality; respect of human dignity; the right to life; freedom from slavery, servitude and forced labour; and freedom of religion, belief and opinion. However, it is also notable amongst international human rights instruments for its extensive range of socio-economic rights such as the right to clean water, rights to healthcare, food, social security and access to adequate housing.

3.62 In the light of its supreme status in the law, the Bill of Rights may only be amended through special procedure in both the houses of Parliament.

3.63 Another notable feature of the South African Bill of Rights is its international influences – in particular, the Constitutional Court is obliged to consider both international and foreign law.

Gibraltar

3.64 Gibraltar has been a British Overseas Territory since the Treaty of Utrecht in 1713 and is a common law jurisdiction. Under its current constitution, Gibraltar governs its own affairs (with the exclusion of certain areas such as defence and foreign affairs, which remain the responsibility of the UK Government).

[52] Text available at: http://www.info.gov.za/documents/constitution/1996/96cons2.htm/.

3.65 The 2006 Gibraltar Constitution[53] replaced the earlier Constitution of 1969, which included a chapter incorporating the rights in the European Convention on Human Rights. The 2006 Constitution contains (in chapter 1) an elaboration of the Convention rights – deliberately expressing them in different language tailored to the circumstances in Gibraltar – and including additional rights not mentioned in the Convention.

3.66 There is, however, an express requirement within the text of certain of the constitutional rights for them to be read in a manner that takes account of Strasbourg jurisprudence, as well as a more general duty on the courts to do so (analogous to the duty imposed on the courts under section 2 of the Human Rights Act). Consequently, greater weight is now accorded to Strasbourg jurisprudence than previously, when more reliance had been given to judgments of English courts and to the decisions of the Privy Council.

Cyprus

3.67 Cyprus is essentially a common law jurisdiction. The Constitution of Cyprus[54] (1960) contains a Chapter on fundamental rights and liberties. Much of this text is based on – and is in parts expressed in identical terms to – the European Convention on Human Rights. Furthermore, the Cypriot courts rely heavily on Strasbourg jurisprudence when interpreting the Cypriot Constitution.

3.68 The Constitution also contains some more extensive constitutional rights than those found in the Convention, adapting some to the domestic circumstances in Cyprus. These include express, stand-alone rights to corporeal integrity, privacy of the home and privacy of communication.

3.69 Unlike most common law jurisdictions, the Cypriot legal system is 'monist' (see paragraph 4.4). Under Cypriot law, the Convention also forms part of the domestic law and, with the exception of the Constitution, prevails over the ordinary law.

The Commonwealth

3.70 The Commonwealth, as an organisation, has human rights at the heart of its activity. This is illustrated by the Singapore Declaration of Commonwealth Principles 1971,[55] a seminal text for the organisation and its members, which states that:

> "we believe in the liberty of the individual, in equal rights for all citizens regardless of race, colour, creed or political belief, and in their inalienable right to participate by means of free and democratic political processes in

[53] Text available at: http://www.gibraltarlaws.gov.gi/constitution.php.
[54] Text available at: http://www.kypros.org/Constitution/English/.
[55] Text available at: http://www.thecommonwealth.org/Internal/20723/32987/singapore_declaration_of_commonwealth_principles/.

framing the society in which they live. We therefore strive to promote in each of our countries those representative institutions and guarantees for personal freedom under the law that are our common heritage."

3.71 As is noted later in the report, after the UK extended the application of the European Convention on Human Rights to the Commonwealth countries and British Overseas Territories in 1953, the Commonwealth countries subsequently drew heavily on the Convention in developing their own constitutions and Bills of Rights. Nigeria led the way with its pre-independence written constitution, but many members of the Commonwealth have since adopted their own instruments – whether local or heavily influenced by other international instruments.

Other European Countries

France

3.72 In 1789, five days after the Bill of Rights was adopted by the US House of Representatives, the French National Constituent Assembly adopted the Declaration of the Rights of Man and of the Citizen.[56] This was followed by a more extensive Declaration in 1793. While some of the provisions echo those of the British and American statements of rights, the Declaration of 1793 foreshadows other provisions of the European Convention on Human Rights (for example, Articles 10 and 14 of the 1793 Declaration foreshadow Article 7 of the European Convention on Human Rights) and in some respects goes further (for example, Article 22 affirms the right to education). However, in so far as the Declaration affirmed the rights of citizens, these could, by definition, be enjoyed only by men, since women were not citizens.[57]

3.73 The Declaration of the Rights of Man had considerable influence throughout the world, but did not acquire constitutional status in France until 1958. The preamble of the Constitution of the Fifth Republic now provides that the principles set forth in the Declaration have constitutional value. This has led the Conseil Constitutionnel and the Conseil d'Etat to annul laws and regulations that do not comply with those principles.

The Benelux countries

3.74 The first constitution of the Seven United Provinces of The Netherlands included a specific provision guaranteeing freedom of conscience to every inhabitant of the Republic. A notable tradition of the Dutch Republic was the individual right of petition, which was, and remains, absolute and cannot be limited by law.

[56]Text available at: http://www.diplomatie.gouv.fr/en/france/institutions-and-politics/the-symbols-of-the-republic/article/the-declaration-of-the-rights-of.

[57]In 1789 women presented, unsuccessfully, a Petition to the National Assembly proposing a decree giving equal rights to women. This was followed in 1791, equally unsuccessfully, by a Declaration of the Rights of Woman and the Female Citizen.

3.75 After the French invasion in 1794, the so-called Batavian Republic adopted a Declaration of the Rights of Man and of the Citizen on the French model.

3.76 In 1815, following the end of the Napoleonic Wars, the Prince of Orange became King of the United Kingdom of The Netherlands, which then included most of what is now Belgium. He granted a Constitution with a limited Bill of Rights, including freedom of religion, the principle of habeas corpus, the right of petition and freedom of the press.

3.77 In 1830 Belgium seceded and gained its own King and constitution. Dicey said that "the Belgian constitution comes very near to a written reproduction of the English constitution."[58] He refers to it frequently to illustrate the differences between a written constitution and the unwritten 'English' constitution, and also to illustrate the similarities – for example, between Article 7 of the Belgian constitution and clause 27 of Magna Carta and the Petition of Right, discussed above.

3.78 Until 1890, the King of The Netherlands was also Grand Duke of Luxembourg and granted a constitution in 1868.

3.79 The constitutions of all three countries begin with a statement of basic rights, which, in the case of The Netherlands and Belgium, now include social and economic rights.[59]

Germany

3.80 The second part of the constitution of the short-lived Weimar Republic of Germany contained a lengthy statement of basic rights (Grundrechte), including some social and economic rights, and basic responsibilities (Grundpflichte), including those of providing services to the community and compulsory military service. The Weimar Constitution also contained special provisions relating to religion and religious associations, which have been adopted as an integral part of the constitution of the Federal Republic.

3.81 The constitution of the Federal Republic, known as the Basic Law (Grundgesetz) opens with a statement of Basic Rights.[60] Article 18 provides for forfeiture of basic rights:

> "whoever abuses freedom of opinion, in particular freedom of the press (Article 5, paragraph 1), freedom of teaching (Article 5, paragraph 3), freedom of assembly (Article 8), freedom of association (Article 9), the secrecy of mail posts and telecommunications (Article 10), property

[58]Dicey, *The Law of the Constitution,* 1st ed. (London: Macmillan and Co. Ltd, 1886), p. 86 and elsewhere, notably p. 202.
[59]For the texts, see http://www.servat.unibe.ch/icl/nl00000_.html (The Netherlands); http://www.servat.unibe.ch/icl/be00000_.html (Belgium); http://www.servat.unibe.ch/icl/lu00000_.html (Luxembourg).
[60]Text available at: http://www.iuscomp.org/gla/statutes/GG.htm.

(Article 14), or the right of asylum (Article 16, paragraph 2) in order to attack the free democratic basic order, forfeits these basic rights. The forfeiture and its extent are pronounced by the Federal Constitutional Court."

3.82 Article 19(4) affirms the right of any person whose right has been violated by public authority to have recourse to a court. Further rights are affirmed in Chapter IX on the Administration of Justice, which includes a number of provisions on due process. Article 101(1) provides that "no-one may be removed from [the jurisdiction of] his lawful judge [the judge appointed according to law]," excluding "extraordinary courts." (The primary purpose of these provisions is to exclude the possibility of creating special courts like the notorious Nazi Peoples' Courts).

3.83 The constituent Länder of the Federal Republic each has its own constitution, many of which (but not all) include a Chapter setting out the basic rights of individuals.[61]

Spain

3.84 Spain's national constitution,[62] which has been in force since 1978, contains a Chapter on fundamental rights, which apply throughout the country and at all levels of government. In recent years some 17 "autonomous communities" have been established with their own Statutes of Autonomy. Some of these statutes, such as the Catalan and Valencian, contain their own charters of rights. Others, such as the Basque, do not. The Catalan and Valencian Statutes are similar in that they both contain socio-economic rights, which, broadly speaking, the national constitution does not. However, the content of the additional rights is expressed in quite different language, and, to some extent, seems to be to slightly different effect: for instance, the Catalan statute contains a reference to rights of minors, whereas the Valencian does not mention rights of the child. In 2010 the Spanish Constitutional Court held that some of the Catalan Statute's provisions, including linguistic rights were unconstitutional.

The Nordic countries

Denmark

3.85 Part VIII of the Danish constitution (1953)[63] sets out relatively briefly individual rights and freedoms (personal liberty, inviolability of the dwelling, right to property, free and equal access to trade, right to work, education, freedom of speech, freedom of

[61]Prof. Dr. Ulrich Karpen, "Subnational Constitutionalism in Germany" (Paper presented at the Centre for State Constitutional Studies Conference on Subnational Constitutions and Federalism: Design & Reform, Bellagio, Italy, 22 March 2004), available at: http://camlaw.rutgers.edu/statecon/subpapers/karpen.pdf.
[62]Text available at: http://www.lamoncloa.gob.es/IDIOMAS/9/Espana/LeyFundamental/index.htm.
[63]Text available at: http://www.servat.unibe.ch/icl/da00000_.html.

association and assembly) and includes a provision requiring every male person to contribute to the defence of his country under such rules as are laid down by statute. There are also provisions relating to religious liberty.

3.86 The European Convention on Human Rights was incorporated into Danish law by a law (no. 285) of 1992. Reacting to the proposal of a Government committee that other international covenants be incorporated, the Danish Government took the view that this was unnecessary as Denmark is legally bound to comply with such conventions as from ratification, and that non-incorporated conventions can in any event be relied on as relevant sources of law.

3.87 It is assumed rather than expressly provided that the Danish Supreme Court has power to declare a statute unconstitutional and therefore inapplicable.

Finland

3.88 Article 1 of the Constitution of Finland (2000) provides that "the constitution shall guarantee the inviolability of human dignity and the freedom and rights of the individual and promote justice in society. Finland participates in international co-operation for the protection of peace and human rights and for the development of society."[64]

3.89 Chapter 2 of the Constitution prescribes Basic Rights and Liberties, including equality (including the right of children to be treated equally and as individuals); the freedoms protected by the European Convention on Human Rights; electoral and participatory rights; educational rights; the right to work; the right to social security; and the right to a healthy environment.

3.90 Article 21 of the Constitution includes the right to have a decision affecting the individual's rights and obligations to be reviewed by a court of law or other independent organ for the administration of justice. Article 106 requires courts, where the application of a statute would be in evident conflict with the Constitution, to give primacy to the provision of the Constitution.

3.91 Article 127 imposes the obligation on every citizen to participate or assist in national defence, subject to statutory exemptions on grounds of conscience.

Norway

3.92 The Norwegian Constitution, written in Danish in 1814,[65] remained in force in spite of the enforced Union with Sweden in 1815, and remains, with amendments in force today. Article 2 asserts the right to free exercise of religion. Section C deals with the

[64]Text available at: http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf.
[65]Text available at: http://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/.

rights of citizens including the right to vote and the loss of that right. Section E (General Provisions) asserts a number of fundamental rights, including freedom of expression and the right of access to official documents.

3.93 Norway is party to a number of international human rights instruments, which are treated as having the force of law by virtue of ratification. The Constitution does not confer any express power on the courts to declare legislative provisions inapplicable on the grounds of incompatibility with international instruments, and the Supreme Court has preferred to judge human rights issues by reference to the Constitution.

3.94 In 2009, the Norwegian Parliament established a Commission on Human Rights in the Constitution with a remit to make recommendations for limited revision of the Constitution to coincide with its 200th anniversary "with the object of strengthening the position of statutory national human rights by enshrining central human rights in the Constitution."

3.95 The Commission reported in December 2011. It found that protection of human rights under the existing Constitution is fragmentary and incomplete and that some of the provisions are ambiguous or out-of-date. The Commission has proposed that the human rights provisions of the Constitution should be grouped together in a single chapter, written in a manner consistent with Norwegian traditions and values, and taking into account the modern constitutions of western European countries, especially the other Scandinavian countries, and international human rights instruments, including the European Convention on Human Rights, the EU Charter of Fundamental Rights and the Universal Declaration.[66]

3.96 As well as the rights protected by the European Convention on Human Rights, the proposed new chapter includes provisions concerning the rights of the family and of children, education (including equal opportunities for higher education on the basis of qualifications), the standard of living, health care and the environment.

3.97 The suggested new Article 114 would provide that "in cases brought before the Courts, the Courts have the right and duty to examine whether the law and other decisions of the authorities of the State conflict with the Constitution." This has given rise to heated debate on the ground that power would pass from Parliament, representing the people, to the courts. Its proponents argue that, if the new provisions pass into law by amendment of the Constitution through a two-thirds majority in the Parliament, that will constitute the will of the people, which the courts should enforce.

[66] A summary of the recommendations, including the proposed text of new constitutional provisions, can be found by going to the Parliament's website at http://www.stortinget.no/en/In-English/About-the-Storting/News-archive/Front-page-news/20112012/The-Stortings-Human-Rights-Commission/ and clicking on the link to "the Commission's recommendations for constitutional amendments."

Sweden

3.98 Four fundamental laws together make up the Swedish constitution: the Instrument of Government; the Act of Succession; the Freedom of the Press Act and the Fundamental Law on Freedom of Expression.[67]

3.99 The Act of Succession dating back to the sixteenth century governs succession to the Crown, originally in the form of a treaty between the royal dynasty and the four Estates.

3.100 The Instrument of Government dates back to the beginning of the eighteenth century. Chapter 1 sets out the "Basic Principles of the Form of Government." Chapter 2 sets out "Fundamental Rights and Freedoms," stating first the rights and freedoms and then "conditions for limiting rights and freedoms" and finally the "special limitations" that may be introduced to the rights and freedoms of "foreigners within the realm." Article 19 provides that "no act of law or other provision may be adopted which contravenes Sweden's undertakings under the [European Convention on Human Rights]." Article 14 of Chapter 11 (Administration of Justice) provides that:

> "if a court finds that a provision conflicts with a rule of fundamental law or other superior statute, the provision shall not be applied…
>
> In the case of review of an act of law under paragraph one, particular attention must be paid to the fact that the Riksdag [Parliament] is the foremost representative of the people and that fundamental law takes precedence over other law."

3.101 The Freedom of the Press Act also has a very long history going back to the eighteenth century and now deals in considerable detail with all aspects of the dissemination of information and opinion in print. Chapter 2 enshrines the principle, also going back to the eighteenth century, of "free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information."

3.102 The Fundamental Law on Freedom of Expression complements the Freedom of the Press Act by dealing, again in considerable detail, with the more modern ways of disseminating information and opinion – radio, television, films, video and sound recordings, databases, the internet, etc.

[67] Text available at: http://www.riksdagen.se/en/Documents-and-laws/Laws/The-Constitution/.

Chapter 4: The International Landscape of Human Rights

Introduction

4.1 Provisions for the protection of freedom of conscience and religion were included in several of the treaties concluded during and after the European wars of the seventeenth, eighteenth and early nineteenth centuries, and the break-up of the Ottoman Empire.[68]

4.2 After the First World War and the further break-up of Empires in central and eastern Europe, there were a number of proposals for a system of international legal protection of human rights. The starting point is generally seen as the Treaty of Versailles, and the subsequent adoption of bilateral treaties to protect the rights of minorities as an integral part of the system of collective security and preservation of peace established under the aegis of the Covenant of the League of Nations. The Minority Treaties did not, however, provide protection for everyone within a state, nor did they apply to all states, and in 1922 the League of Nations passed a resolution urging all states to respect the principles of the Minority Treaties.

4.3 In 1929, the Institut de Droit International proposed the adoption of an international Convention for the general protection of minorities and an international Declaration of the Rights of Man.[69]

4.4 These projects faced a number of theoretical and practical objections, especially the following:

> (1) Many, if not most, international lawyers held that the function of international law was to regulate the rights and relationships of states, and not to regulate, or intervene in, the relationship between states and individuals.
>
> Some states – notably the United Kingdom – held firmly to the principle (known as 'dualism') that international law and national law operate on different planes, so that rules of international law can enter the sphere of national law only by 'incorporation', usually by parliamentary legislation.

[68] For example, the Treaties of Oliva (1660), Nijmegen (1678-79) and Ryswick (1697); various acts signed at Vienna in 1815; and the Treaties of San Stefano and of Berlin (1878).

[69] The Institut de Droit International was founded in 1873 and was awarded the Nobel Peace Prize in 1904. One of the leading British members who took part in 1929 was Sir Thomas Barclay, President in 1919, who had been one of the architects of the Entente Cordiale and was nominated ten times for the Nobel Peace Prize. Another member was Hjalmar Hammarskjöld, father of Dag Hammarskjöld.

Some states – for example, Belgium – held the opposite point of view (known as 'monism'), believing that there is no such distinction between rules of international and national law: the relevant question is whether the rule of international law is such as to have 'direct effect' in the sphere of national law.

Other states held intermediate positions – for example, that some provisions of international law may be 'self-executing' (the USA) or that treaty provisions may become part of national law if this is accepted and enforced by all the contracting states on the principle of reciprocity (France).

(2) The second objection related to the problem of enforcement: even if it were accepted that international law might regulate the relationship between states and individuals, no international organisation could properly take measures against a state to enforce individual rights against that state.

(3) The third objection related to the right of the individual to invoke the jurisdiction of an international body: even if it were accepted that there should be some machinery of enforcement, only another state could properly call for that machinery to be set in train.

(4) In addition, an influential school of thought agreed with Jeremy Bentham that the very idea of inalienable natural rights is "nonsense upon stilts" and maintained, with some justice, that the adoption of high-sounding phrases may not only be a substitute for practical action, but also a cover for the reality of tyranny.

4.5 The weakness of a system of international protection through treaties without an effective means of enforcement was all too cruelly illustrated by the events leading up to the Second World War. That war and its causes led to a complete change of attitude at the international level. Despite the weaknesses of the earlier treaties, the principles of international law that had been developed (freedom of conscience and religion, protection of minorities and stateless persons, and the protection of civilians in a time of war) provided the groundwork for the modern system of protection of human rights.

4.6 A notable milestone during the War was the Declaration of the United Nations of 1st January 1942, which confirmed the conviction of the signatories "that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in

other lands."[70] Later the same year, Winston Churchill looked forward to the time "when this world's struggle ends with the enthronement of human rights."[71]

4.7 Also in 1942, Hersch Lauterpacht, Professor of International Law at Cambridge and later the British Judge of the International Court of Justice, delivered a series of lectures on "The Law of Nations, the Law of Nature and the Rights of Man." These were developed, together with a detailed draft Bill of Rights, in a highly influential book entitled *An International Bill of the Rights of Man*.[72]

4.8 The problem, as Lauterpacht saw it, was that "the sovereign State, in an exclusive and unprecedented ascendancy of power, [had become] the unsurpassable barrier between man and the law of mankind."[73] His aim was, first, to show that an enforceable International Bill of Rights would not be "a break with what is truly permanent in the legal tradition of western civilisation but that it would be in accordance with the purpose of the law of nations. … That purpose cannot be permanently divorced from the fact that the individual human being – his welfare and the freedom of his personality in its manifold manifestations – is the ultimate unit of all law."[74] His second aim was "to put forward concrete proposals as a starting point of deliberation and discussion aiming at the incorporation of the International Bill of the Rights of Man as an integral part of the law of nations."[75]

The UN Charter and the Universal Declaration of Human Rights

4.9 In the immediate aftermath of the war, in 1945, the United Nations was established with the adoption of the United Nations Charter.[76] The preamble to the Charter stated the aim of the UN to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." Article 1(3) reiterated the aim "to achieve international co-operation in … promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

4.10 This in turn led to the creation of the Universal Declaration of Human Rights Drafting Committee, chaired by Eleanor Roosevelt, which formally took over the task set by the United Nations Commission on Human Rights of creating a preliminary draft International Bill of Human Rights. The Committee consisted of nine members

[70]Text available at: http://www.ibiblio.org/pha/policy/1942/420101a.html.
[71]Churchill, Message addressed to the World Jewish Congress, 29 October 1942.
[72]Lauterpacht, *An International Bill of the Rights of Man* (New York: Columbia University Press, 1945).
[73]Ibid., Introduction, p. 5.
[74]Letter to his wife dated 4 September 1942, quoted in Elihu Lauterpacht, *The Life of Sir Hersch Lauterpacht* (Cambridge : Cambridge University Press, 2010), p. 252.
[75]Lauterpacht, *An International Bill of the Rights of Man* (New York: Columbia University Press, 1945), Preface, p. vi.
[76]Text available at: http://www.un.org/en/documents/charter/index.shtml.

including John P. Humphrey, the Director of the UN's Human Rights Division and producer of the first blueprint for the Declaration; René Cassin, who produced a subsequent draft; and Charles Dukes of the United Kingdom. Although Sir Hersch Lauterpacht did not take part in the drafting process directly,[77] his book, *An International Bill of Rights*, had a major influence on the work of the Drafting Committee. The Universal Declaration, adopted by the United Nations in December 1948, is said to be the "foundation of the international human rights legal system."[78] And, together with the International Covenant on Economic, Social and Political Rights and the International Covenant on Civil and Political Rights (outlined below), the Declaration is viewed informally by some commentators as constituting an International Bill of Human Rights.

4.11 As well as serving as a starting point for the many human rights treaties that have since been negotiated through the UN system, the Declaration has been followed at the global level, by treaties and conventions dealing with specific issues, details of which follow later in this chapter. At the regional level, it was followed by the European Convention on Human Rights (1950), the Inter-American Convention on Human Rights (the San Jose Pact, 1969) and The African ("Banjul") Charter on Human and Peoples' Rights (1981). The Commonwealth also sets out respect for human rights as one of the core political values underlying the criteria for membership of the organisation. Its Secretariat assists member countries in adopting international human rights standards, including those set out by the UN.

The UN Convention relating to the Status of Refugees[79]

4.12 The UK ratified the Convention relating to the Status of Refugees in March 1954 and its subsequent Protocol in September 1968. The Convention defines who constitutes a refugee, what refugees' rights are, and the legal obligations of signatories to the Convention. A key provision is the principle of non-refoulement whereby a refugee should not be returned to a country where he or she faces a serious threat to his or her life or freedom (under Article 33 of the Convention).

4.13 Whilst there is no formal method of enforcement, the UK is obliged by the Convention to co-operate with the Office of the United Nations High Commissioner for Refugees (under Article 35) and must also report to the Secretary-General of the UN[80] the laws and regulations which it adopts to ensure the application of the Convention.

[77]The reasons for his exclusion reflect little credit on the United Kingdom -- see Simpson, *Human Rights and the End of Empire* (Oxford: Oxford University Press, 2001), p. 350.
[78]Lester, Pannick, and Herberg, *Human Rights Law and Practice*, 3rd ed., (London: LexisNexis, 2009), p. 823.
[79]Text available at: http://www2.ohchr.org/english/law/refugees.htm.
[80]See http://www.un.org/sg/.

The UN International Covenant on Civil and Political Rights[81]

4.14 The UK ratified the International Covenant on Civil and Political Rights in May 1976. It sets out individuals' right to self-determination and the obligation to respect the civil and political rights of individuals, including the right to life; freedom from torture and slavery; freedom from arbitrary arrest; right to due process and a fair trial; the freedom of movement, thought, conscience, religion, speech, assembly and association; electoral rights; and the right to equality before the law.

4.15 The Human Rights Committee is the guardian of the Covenant and is a "judicial body of high standing."[82] The Committee may adopt guidance (in the form of 'general comments') which elaborates further on the content of the substantive guarantees contained in the Covenant.

4.16 The UK Government must submit reports to the Committee every five years outlining the measures it has taken to give effect to the rights protected by the Covenant and on the progress made in the enjoyment of those rights. In response, the Committee publishes concluding comments on the performance of the UK, including a number of principal subjects of concern in which it believes the UK may be failing to meet its Covenant obligations.

4.17 The UK has recognised the competence of the Committee to operate an inter-state complaint mechanism, considering complaints against any state party by another state party concerning a violation of its obligations under the Covenant. However, the UK has not accepted the competence of the Committee to consider individual complaints as it has not acceded to the First Optional Protocol to the Covenant.

4.18 Although containing similar rights framed in more open-textured language, the International Covenant on Civil and Political Rights' provisions differ substantively from the European Convention on Human Rights. Notably, the International Covenant on Civil and Political Rights contains a freestanding right to equality,[83] whereas the equivalent provision in the Convention – Article 14 – only provides for freedom from discrimination in the enjoyment of other Convention rights.

The UN International Covenant on Economic, Social and Cultural Rights[84]

4.19 The UK also ratified the International Covenant on Economic, Social and Cultural Rights in May 1976, with reservations entered on certain articles, (meaning that the UK is not bound by those areas). It establishes individuals' right to self-determination; and to "freely determine their political status and freely pursue their economic, social

[81]Text available at: http://www2.ohchr.org/english/law/ccpr.htm.
[82]Lester, Pannick, and Herberg, *Human Rights Law and Practice*, 3rd ed., (London: LexisNexis, 2009), p. 828.
[83]Art. 26.
[84]Text available at: http://www2.ohchr.org/english/law/cescr.htm.

and cultural development." It also sets out the signatories' commitment to guarantee "to the maximum of [their] available resources" a range of economic, social and cultural rights to individuals. These rights include: the right to work; the right to social security; the right to be free from hunger; the right to education; the right to health; and the right to family life.

4.20 The Committee on Economic, Social and Cultural Rights is a body of independent experts responsible for monitoring the implementation of the Covenant. The only supervisory or enforcement mechanism under the Covenant is the UK's obligation to report every five years on its record under the Covenant. In response, the Committee makes concluding observations, in addition to its general power to make general comments to assist and promote the further implementation of the rights contained in the Covenant.

The UN International Convention on the Elimination of Racial Discrimination[85]

4.21 The UK ratified the UN International Convention on the Elimination of All Forms of Racial Discrimination in March 1969. Under this Convention, the UK is committed to ensuring that there is no racial discrimination in the exercise and enjoyment of a wide range of civil, political, economic, social and cultural rights; and to promote understanding among all races. There are other provisions in the Convention, including the prohibition of incitement of racial discrimination, apartheid and racial segregation.

4.22 The Committee on the Elimination of Racial Discrimination is a body of independent experts who monitor the enforcement of the Convention. The UK submits reports to the Committee every two years on how it is implementing the provisions of the Convention. The Committee is able to comment on the UK's performance, in addition to its general power to issue general recommendations (on the interpretation of the content of human rights provisions) and thematic discussions which elaborate further on the nature of the states obligations.

4.23 The Convention provides for an obligatory inter-state complaints procedure, which is conciliatory in nature. The UK has not accepted the right of individual petition.

The UN Convention on the Elimination of All Forms of Discrimination Against Women[86]

4.24 The UK ratified the Convention on the Elimination of All Forms of Discrimination Against Women in April 1986 but entered reservations about certain provisions, which as stated above means that the UK is not bound by those provisions. The Convention

[85]Text available at: http://www2.ohchr.org/english/law/cerd.htm.
[86]Text available at: http://www2.ohchr.org/english/law/cedaw.htm.

defines what constitutes discrimination against women and sets out an agenda for national action to eliminate any such discrimination, such as incorporating the principle of equality of men and women in legal systems and abolishing any discriminatory laws.

4.25 The only enforcement procedure under the Convention is the reporting mechanism whereby the UK submits a progress report every four years, in accordance with Article 18 of the Convention, to the Committee on the Elimination of All Forms of Discrimination Against Women.[87] In addition, the Committee may also make general recommendations about the content of the provisions.

4.26 In December 2004, the UK acceded to the Optional Protocol to the Convention which allows individuals to make a petition to the Convention's Committee.

The UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment[88]

4.27 The UK ratified the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment in December 1988 (and incorporated it into UK law by section 134 of the Criminal Justice Act 1988), meaning that it is binding on the UK as a matter of domestic (as well as international) law. The Convention expands on the rights in Article 7 of the International Covenant on Civil and Political Rights which states that:

> "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

4.28 In particular, the Convention defines what constitutes torture; commits the UK to taking effective measures to prevent acts of torture within its jurisdiction; and prohibits removal of an individual to another jurisdiction in which there are substantial grounds for believing that they might be subjected to torture.

4.29 In December 2003, the UK ratified the Optional Protocol to the Convention Against Torture which establishes a system of regular visits by independent national and international bodies to places of detention.

4.30 The Committee Against Torture is a body of independent experts which monitors the implementation of the Convention. The UK submits a report to the Committee every four years and in response the Committee makes concluding observations and recommendations.

[87] Text available at: http://www2.ohchr.org/english/bodies/cedaw/.
[88] Text available at: http://www2.ohchr.org/english/law/cat.htm.

4.31 The UK has accepted the Committee's jurisdiction to receive inter-state complaints. However, the UK has not recognised the Committee's jurisdiction to consider complaints from individuals.

The UN Convention on the Rights of the Child[89]

4.32 The UK ratified the Convention on the Rights of the Child in 1991, with several reservations[90] and declarations.[91] The general aims of the Convention have been identified as[92]:

> a) The protection of children against discrimination and all forms of neglect and exploitation (in particular under Article 2);
>
> b) The provision of assistance for their basic needs (in particular under Article 3);
>
> c) The prevention of harm to children (in particular under Article 6); and
>
> d) The participation of children in decisions affecting their own destiny (in particular under Article 12).

4.33 The UK also ratified two optional protocols to the Convention which expanded on its provisions: the Optional Protocol to the Convention on the Rights of the Child in the Involvement of Children in Armed Conflict and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The Government said in its most recent report for its Universal Periodic Review that it is considering signing the recent third Optional Protocol (on a communication procedure).

4.34 The only enforcement procedure under the Convention is the reporting mechanism whereby the UK submits a progress report every five years to the Committee on the Rights of the Child. In response the Committee makes concluding observations on the Government's performance.

4.35 While the UK Parliament has not incorporated the Convention on the Rights of the Child into UK law, the Welsh Assembly has recently passed legislation that places a duty on Welsh Ministers to have "due regard" to the rights and obligations under the

[89]Text available at: http://www2.ohchr.org/english/law/crc.htm.

[90]A reservation is a statement made by a state when signing, ratifying, accepting, approving or acceding to a treaty which aims to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.

[91]A declaration is a statement made by a state when signing, ratifying, accepting, approving or acceding to a treaty, which aims to clarify a State's position on the interpretation of certain provisions, but does not attempt to exclude or modify the legal effect of the treaty in its application to that state.

[92]Lester, Pannick and Herberg, *Human Rights Law and Practice*, 3rd ed., (London: LexisNexis, 2009).

Convention in the exercise of any of their functions.[93] The Scottish Government also recently consulted on a draft Children and Young People Bill which would include a similar duty.

The UN Convention of the Rights of Persons with Disabilities[94]

4.36 The UK ratified the Convention on the Rights of Persons with Disabilities in July 2009, having signed the Optional Protocol in February 2009. The Convention aims to protect the rights and dignity of people with disabilities (including in relation to justice, education, work and employment, and family life); ensure that they enjoy full equality before the law; and prevent discrimination and raise awareness about disability issues.

4.37 The Committee on the Rights of Persons with Disabilities is a body of independent experts which monitors the implementation of the Convention by state parties. The UK submits a report every four years on its performance under the Convention, including on its national framework to promote, protect and monitor disability rights.

4.38 Under the Optional Protocol to the Convention, the UK has accepted the Committee's competence to examine individual complaints against the UK with regard to alleged violations of the Convention.

Wider human rights protection within the UN system

4.39 In addition to the establishment of the agreements above, there are other parts to the UN structure and machinery which are worthy of brief mention here.

4.40 The Office of the United Nations High Commissioner for Human Rights was established by the UN General Assembly in 1993. It works to promote and protect the human rights set out in the 1948 Declaration and in international law and to co-ordinate human rights activities throughout the United Nations system. The Head of the Office, the High Commissioner for Human Rights, is the principal human rights official of the United Nations. The Office supports the work of the nine United Nations treaty bodies (outlined above), which monitor compliance with specific human rights treaties.

4.41 Another of the activities of the Office of the High Commissioner is to supervise the Human Rights Council. The Council was established in 2006 with a mandate to investigate human rights abuses and to make recommendations for actions – including to the UN Security Council – based on its findings.[95] It has established special procedures to address country-specific and thematic human rights issues,

[93]The Rights of Children and Young Persons (Wales) Measure 2011, s. 1.
[94]Text available at: http://www.un.org/disabilities/default.asp?id=259.
[95]This body was previously the UN Human Rights Commission.

such as a special rapporteur for investigating contemporary forms of slavery and a working group for investigating situations of arbitrary detention in UN Member States. The Council operates a complaints procedure that enables individuals and organisations to bring alleged abuses of human rights to its attention.

4.42 The Council also manages the Universal Periodic Review, a mechanism for periodically examining the human rights performance of all 193 UN Member States. Reviews are based on a report prepared by the state concerned, information from other UN human rights bodies and information from other stakeholders, including civil society, non-governmental organisations and national human rights institutions. Each state is allocated three hours to present their human rights record, face questioning and discuss recommendations for the improvement of its human rights performance. The UK underwent this review in April 2008 and again in May 2012.[96]

4.43 To complement its work, the Office of the High Commissioner for Human Rights has encouraged the growth of National Human Rights Institutions. These are administrative bodies set up to protect or monitor human rights in UN Member States. There are approximately one hundred such institutions around the world. The Scottish Human Rights Commission, the Northern Ireland Human Rights Commission and the Equality and Human Rights Commission (for England and Wales, and in certain respects Scotland) are National Human Rights Institutions. This is discussed in further detail in chapter 6 of this report.

4.44 Each of the UK's national human rights commissions has gained UN accreditation as a National Human Rights Institution and conforms to the standards set out for such institutions by the United Nations. Accreditation means that they have an enhanced status in domestic and international contexts and access to assistance from treaty bodies and other human rights organs of the United Nations. The institutions also undergo a periodic peer review procedure to maintain their status within the UN human rights system.

4.45 As part of its work, the Office of the High Commissioner for Human Rights interacts with other agencies and partners involved in the promotion and protection of human rights. Among the bodies that work alongside the Office of the High Commissioner for Human Rights are the UN High Commissioner for Refugees, the Office for the Coordination of Humanitarian Affairs, the United Nations Development Program, the United Nations Children's Fund and the World Health Organisation.

4.46 Finally, it should be noted that the UN General Assembly is also important to human rights promotion and protection. Under Article 13 of the UN Charter, the General Assembly is granted the power to initiate studies and make recommendations on

[96]Details of the UK's latest report can be found on the Ministry of Justice's website: http://www.justice.gov.uk/human-rights/universal-periodic-review.

human rights issues. Human rights concerns and draft General Assembly Resolutions on human rights issues are often referred to the Third Committee of the General Assembly for deliberation. The Third Committee is also engaged in the examination of reports emanating from the Human Rights Council.

International Courts

4.47 There are permanent international judicial organs concerned with human rights, including the International Court of Justice and the International Criminal Court. The International Court of Justice was established by the Charter of the United Nations in 1945. It began work in 1946 with the primary role of settling, under international law, legal disputes between any UN Member States. However, the Court also issues opinions on legal questions at the request of the organs of the United Nations. The Court has thus dealt with human rights issues including the scope of reservations to human rights treaties, application of human rights instruments to occupied territories and allegations of genocide by one state against another.

4.48 The International Criminal Court was established in 1998. It is a permanent tribunal with jurisdiction to prosecute individuals for serious international crimes involving gross and systemic human rights violations – including genocide, crimes against humanity and war crimes. The Court takes up a case only when national courts have been unable or unwilling to prosecute the individuals concerned. One hundred and twenty one states – including the United Kingdom – have accepted the jurisdiction of the Court. Since 2002, the Court has conducted investigations into situations in a number of countries and publicly indicted individuals for abuses.

Chapter 5: The European Landscape of Human Rights

Introduction

5.1 As noted above, since the establishment of the UN Charter and the proclamation of the Universal Declaration of Human Rights, a number of regional systems for the protection of human rights have also emerged. In Europe, these are principally:

- the Council of Europe and the instrument to which all its members are signatories, the European Convention on Human Rights. Both were established shortly after the Universal Declaration. The Convention was inspired by the Universal Declaration and has as one of its principal objectives the collective enforcement in Europe of the rights referred to in the Declaration;[97] and

- the EU Charter of Fundamental Rights, which became binding in 2009. The Charter aimed to codify fundamental rights already recognised in EU law, including those contained in the European Convention on Human Rights.

The Council of Europe

5.2 The Council of Europe was established in 1949. Winston Churchill called in 1946 for a Council of Europe in which people could live "in peace, in safety and in freedom"[98]; and in 1948, for a Charter of Human Rights that would be "guarded by freedom and sustained by law."[99] He had intended both to provide a bulwark against totalitarianism and against the repetition of the atrocities of the two World Wars.

5.3 The Council of Europe's founding instrument, the Treaty of London (which became the Statute of the Council of Europe[100]), established two bodies that would sit in Strasbourg, France: a Consultative (later Parliamentary) Assembly;[101] and a Committee of Ministers.[102] The Assembly is composed of representatives of the

[97]The Preamble to the Convention states that Convention rights have been agreed "considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948."
[98]Zurich Address, 19 September 1946.
[99]Hague Congress Address, 7 May 1948.
[100]Statute of the Council of Europe, CETS 001, 1949.
[101]Ibid., Art. 10(ii). In February 1994, the Committee of Ministers decided in future to use the denomination 'Parliamentary Assembly' in all Council of Europe documents.
[102]Ibid., Art. 10(i).

national legislatures of all the Member States, reflecting the population of each State and the political composition of their legislatures.[103] The Committee of Ministers is composed of the ministers of Foreign Affairs of each Member State or their permanent diplomatic representatives in Strasbourg. It acts as guardian of the Council of Europe's fundamental values and monitors Member States' compliance with their obligations under the Convention and under the Statute of the Council of Europe. Member States take turns chairing the Council in a six month rotating presidency.

5.4 One of the first acts of the Council of Europe was to prepare the European Convention on Human Rights. Whilst the Convention is the major instrument of the Council of Europe of interest to our inquiry, it is not the only human rights instrument that has emerged from the Council of Europe. In particular, the Council of Europe adopted the European Social Charter in 1961 (ratified by the UK in 1962), the economic and social counterpart to the Convention. In addition, Article 1 of the Statute of the Council of Europe provides that the "maintenance and further realisation of human rights and freedoms" remains one of the central aims of the organisation. The Council has reached agreements in a variety of relevant areas, as diverse as the prevention of torture, the rights of children, and biomedicine.

The European Convention on Human Rights

5.5 The European Convention on Human Rights is an international treaty by which the UK is bound, together with the 47 other Member States of the Council of Europe. It places certain requirements on the UK and on other Member States as a matter of international law.[104] The Convention rights are incorporated into domestic law by the Human Rights Act 1998, the devolution statutes and specific provisions in other legislation.[105]

Origins of the Convention

5.6 The Convention was adopted in 1950 by the twelve original members[106] of the Council of Europe. They sought to achieve greater unity in Europe, in part through the "maintenance and further realisation of human rights and freedoms".[107]

5.7 Following the first meeting of the Council of Europe's Consultative (later Parliamentary) Assembly, a proposal was sent to the Committee of Ministers in July

[103] Ibid., Arts. 22-35.
[104] These include the requirement to secure Convention rights to everyone within its jurisdiction (Article 1), the requirement to provide effective remedies for the violation of Convention rights and freedoms (Article 13) and the requirement to abide by final judgments of the European Court of Human Rights in UK cases (Article 46).
[105] See chapter 6 for a discussion of the Human Rights Act 1998 and of devolution legislation.
[106] Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, The Netherlands, Norway, Sweden, Turkey and the UK.
[107] European Convention on Human Rights, Preamble.

1949 for a Convention on human rights. The draft Convention was based largely on an original draft by David Maxwell-Fyfe, a former Law Officer and later Home Secretary and Lord Chancellor in Conservative administrations in the UK; Pierre-Henri Teitgen, a former French Justice Minister; and Fernand Dehousse, a Belgian jurist and member of the UN Commission on Human Rights. It was published under the auspices of the European Movement, an organisation dedicated to promoting European unity; and influenced greatly by Professor Lauterpacht's book, An International Bill of the Rights of Man. The Committee of Ministers then convened a group of experts to draft the Convention, including Sir Oscar Dowson, a former senior legal adviser to the Home Office, who played a leading role in drafting the final text.

5.8 The Convention sets out a set of fundamental civil and political rights and freedoms and requires signatory states to secure them to everyone within their jurisdiction.[108] Member States have primary responsibility for protecting the Convention rights and freedoms, which include the right to life, liberty and security; a prohibition against torture, inhuman and degrading treatment; the right to a fair trial, and to respect for private and family life; freedoms of expression, assembly and association, thought, conscience and religion; and non-discrimination.[109] Article 13 provides the link between the Convention and national legal systems, requiring states to provide effective remedies for violations of any of the rights and freedoms contained in the Convention.[110] European supervision comes into play only when a signatory state's domestic legal order has failed to provide effective remedies for violations of Convention rights.

5.9 As well as being legally binding in public international law, the Convention also contains a provision enabling individuals to enforce the Convention rights against Member States before an independent, supra-national European court. As a result, States are no longer wholly sovereign as regards the way they treat their citizens. Rather, they are accountable under international law not only for violations of the rights of other States but also for violations of the rights of individuals, including their own citizens.

5.10 At the request of the then UK Government,[111] some rights contained in the original draft text were removed from the Convention as finally adopted, including rights to private property, education and political freedom. The Labour Administration had concerns about the potential impact of the right to compensation on the nationalisation of private property; and the impact of the right to education on the ability to abolish independent fee-paying schools; and the impact of the right to political freedom on the

[108] Arts. 1 and 13.

[109] For the full list of rights contained in the Convention, please see volume 2 of this report.

[110] Article 35(1) of the Convention provides that the Court may only deal with a matter after all domestic remedies have been exhausted by the applicant.

[111] The Labour Government of 1945-51 led by Clement Atlee.

'first past the post' electoral system used in the United Kingdom. However, these rights were later included in Protocol 1 to the Convention, which was ratified by the then UK Government in 1952.[112]

5.11 The Committee of Ministers approved the final text of the Convention in August 1950. The Convention entered into force in September 1953. The UK was the first of the twelve founding States to ratify it – but did do on the understanding that ratification would not permit individuals to bring cases against the UK under the Convention.

5.12 By 1962, a total of fifteen countries had ratified the Convention. Seven further Western European countries joined before 1990. From 1990, former Soviet bloc countries began joining the Convention. Forty seven states in total have now ratified the Convention and are members of the Council of Europe. These states have a combined population of some 800 million individuals.

The European Court of Human Rights

5.13 The Convention as originally introduced created both a European Commission and a European Court of Human Rights; and divided responsibility for the monitoring of the Convention between them.

5.14 Under the original system, the Commission was responsible for sifting applications, fact-finding, forming opinions, seeking friendly settlements and referring important cases to the Court, the supreme judicial authority in interpreting and applying the Convention. Where a friendly settlement could not be achieved, the Commission produced a report containing its opinion as to whether there had been a violation. In that event, the Commission could refer the case either to the Court or to the Committee of Ministers for a political solution.

5.15 However, the respective roles of the two bodies were limited by the fact that the right of individuals to submit a petition to the Commission was conditional on the prior agreement of the country concerned to allow such individual petitions,[113] and by reason of the jurisdiction of the Court being optional rather than mandatory.[114] In 1953, when the Convention entered into force, only three States (Ireland, Denmark and Sweden) accepted the right of individual petition and only two (Ireland and Denmark) accepted the jurisdiction of the Court as mandatory.

5.16 Partly as a result, the number of petitions in the early years of the Convention's existence was low. Just 2,388 applications were received by the Commission in its first decade (to 1964), of which only 36 were declared admissible. The Court delivered

[112]The Conservative Government, led by Winston Churchill. The UK subsequently ratified Protocol 6 and Protocol 13, which abolished the death penalty.
[113]European Convention on Human Rights 1950, Art. 25(1) (now repealed).
[114]European Convention on Human Rights 1950, Art. 46 (now repealed).

just one judgment; and the Commission made just seven reports to the Committee of Ministers.

5.17 Successive UK Governments refused to accept the right of individual petition and the jurisdiction of the Strasbourg Court until 1966 – fifteen years after the UK's ratification of the Convention. It was stated that there was no need to do so because the UK's legal system made sufficient remedies available for breaches of Convention rights. However, by the mid-1960s, the UK had become increasingly isolated in this respect, as more countries accepted both the right of individual petition and the jurisdiction of the Court. In 1966 the then UK Government decided to accept both the right of individual petition and the jurisdiction of the Court.

5.18 All signatory states of the Convention eventually accepted both the Court's jurisdiction and the right of individual petition; and following reforms to the Court system in 1998, these became mandatory.

The Reform of the Court in the 1990s: Protocols 11 and 14

5.19 During the 1980s and early 1990s, as more States ratified the Convention and accepted the jurisdiction of the Court and the right of individual petition, the workload of the Commission and the Court increased. By the early 1990s, the Commission opened ten times as many files as in the early 1970s, and declared between ten and twenty times as many cases admissible.

5.20 In order to address this expanding workload, Member States agreed to reform the monitoring mechanisms of the Convention's. Protocol 11,[115] which entered into force in November 1998, abolished the optional nature of the right to individual petition and of acceptance of the Court's jurisdiction. It also abolished the Commission and re-structured the Court. Under the Protocol, decisions on the admissibility of applications became the responsibility of the Court.

5.21 The Committee of Ministers continued in its role in supervising the execution of judgments by signatory states – that is, ensuring States abided by judgments against them, as required by Article 46(1) of the Convention.

5.22 Despite these changes, the Court's caseload continued to expand through the 1990s and early 2000s. Expansion led to growing delays in the processing and adjudication of individual petitions. In 1998, the Court received some 18,000 new applications from individuals. By 2002, the number of applications had increased by 90%, to over 34,000. By the end of 2003, the Court's backlog was approximately 65,000 cases.[116]

[115]Protocol 11 was ratified by the UK on 9 December 1994 and entered into force on 1 November 1998.
[116]Council of Europe, *Explanatory Report to Protocol 14*, CETS No. 194, paras. 5 and 7.

5.23 The Council of Europe embarked on a set of further reforms, resulting in Protocol 14 to the Convention, which opened for signature in May 2004. However, due to opposition from Russia, the reforms did not come into force until June 2010. In the interim, another Protocol (14bis) provided some short-term increased capacity for the Court to process applications more quickly.

5.24 Key reforms under Protocol 14 include the provision for a single judge, instead of a three-judge committee, to decide on clearly inadmissible cases; and for a three-judge committee, instead of a seven-judge Chamber, to deliver judgments where the applicable case law is well established. The Protocol also introduced a new power in certain limited circumstances to dismiss cases where the applicant had not suffered "a significant disadvantage."[117] Judges are also now appointed for a nine-year rather than six-year term.

5.25 In parallel to the amendments to the Convention, the Court introduced measures to tackle its backlog of cases. These included adoption of a pilot judgment procedure, which enables the Court effectively to deliver one judgment on repetitive cases stemming from the same underlying breach of the Convention. These measures also included a priority policy for processing applications, which allows the Court to prioritise cases for judgment according to their seriousness or urgency, rather than the order in which they are received.[118]

The Court today

5.26 Despite the reforms described above, the Court's caseload has continued to rise. In 2009, some 57,100 applications were lodged with the Court, an overall increase of 15% compared with 2008 (49,850 cases).[119] In 2010, there was a further 7% increase (61,300 cases).[120] This expanding workload has led to further calls for reform.

5.27 In February 2010, a Council of Europe conference on Court reform was held in Interlaken, which agreed a Declaration outlining further measures for Member States to implement or consider. A further conference was held in Izmir in April 2011.

5.28 Our Commission was created in March 2011. Its terms of reference include a requirement to provide to the UK Government "interim advice" on reform of the European Court of Human Rights ahead of the UK's Chairmanship of the Council of Europe in November 2011. Court reform was a key aim of the Chairmanship. In July

[117] Article 35(3)(b) as amended by Protocol 14, states that the Court "shall declare inadmissible any individual application…if it considers that…the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."

[118] European Court of Human Rights, *The Court's Priority Policy*, 2010.

[119] European Court of Human Rights, *ECHR – Analysis of Statistics*, 2009, p. 4.

[120] European Court of Human Rights, *ECHR – Analysis of Statistics*, 2010, p. 4.

2011, we submitted our interim advice to the UK Government, as well as a parallel letter to Ministers. Our advice and the parallel letter are set out in volume two of this report.

5.29 In the months following November 2011, the UK led an initiative, which culminated in a Declaration agreed unanimously by the Member States of the Council of Europe at a conference in Brighton in April 2012. Key points contained within the Declaration include agreement among Member States:

- to reduce the time limit under which an individual can make an application to the Court, from six to four months;
- that the Preamble to the Convention should expressly refer to both the principle of subsidiarity and to the doctrine of margin of appreciation; and
- to commit to stricter admissibility criteria under Article 35.

5.30 These reforms are discussed in more detail in chapter 11.

Convention Rights

5.31 The Convention currently comprises 59 Articles, divided into three sections. Section I contains a list of the substantive rights and freedoms protected under the Convention, which States are required to "secure to everyone in their jurisdiction";[121] Section II establishes the role and structure of the Court (discussed above); and Section III comprises miscellaneous provisions.

5.32 The rights and freedoms in Section I are contained in Articles numbered 2 to 14. Certain rights are described as 'absolute', meaning that no derogations[122] are permitted from such rights under any circumstances.[123] The rest are qualified by exceptions. The rights in Section I have been supplemented over time by the additional rights contained in the Protocols ratified by certain Member States. The Protocols conferring additional rights that the UK has ratified are Protocol 1, 6 and 13.

5.33 The text of Articles 2 to 14 of the Convention and Articles 1 to 3 of Protocol 1 are set out in volume two of this report.

[121] European Convention on Human Rights, 1950, Art. 1.

[122] Article 15 of the Convention provides that Member States can take measures derogating from its obligations under the Convention "in time of war or other public emergency threatening the life of the nation." Article 15(2) provides that no derogations can be made from Articles 3, 4 and 7 and Article 2 (except in respect of deaths resulting from lawful acts of war).

[123] The absolute rights are Articles 3, 4 and 7, Article 1 of Protocol 13 and Article 2 (except in respect of deaths resulting from lawful acts of war).

5.34 The UK has not signed nor ratified Protocols 7 and 12 to the Convention. The object and purpose of Protocol 7 is to extend the rights protected by the Convention to include the additional civil and political rights contained in the International Covenant on Civil and Political Rights. It provides for procedural safeguards relating to the expulsion of aliens, a right of appeal in criminal matters, a right to compensation for wrongful conviction, a right not to tried or punished twice, and a right to equality between spouses.[124] Protocol 12 contains a free-standing right to non-discrimination that extends the rights protected by Article 14. Furthermore, the UK has signed but not ratified Protocol 4, which includes prohibition of imprisonment for debt, freedom of movement, prohibition of expulsion of nationals and prohibition of collective expulsion of aliens.

5.35 The Government has stated that its view is that proposals to ratify Protocols 4, 7 and 12 should be considered in the context of this Commission's work.[125]

5.36 Overall, since the adoption of the Convention in 1953, some 15,000 cases have been brought before the Court against the UK. 400 of these (approximately 3%) have been found admissible. Of those found to be admissible, some three quarters have led to a finding of a violation of at least one Convention right. Overall, violations have been found in fewer than 2% of the total number of cases brought against the UK.

The Convention in UK law

5.37 As a matter of international law, the UK has been bound by the European Convention on Human Rights since it came into force in 1953.

5.38 As noted above, however, until the Human Rights Act 1998 entered into force in 2000, Convention rights were not incorporated directly into UK domestic law.

5.39 Up to that point, the Convention was frequently invoked in domestic proceedings; and the courts became increasingly willing to regard the Convention and its case law as sources of principles or standards of public policy.[126]

[124]The Equality Act 2010 was amended during its Parliamentary passage so as to enable the UK to ratify Protocol 7.

[125]HL Deb., 18 July 2011, col. WA243; HL Deb., 1 May 2012 col. WA454.

[126]In particular, they did so where a statute was ambiguous; or where the common law was developing or uncertain; or certain but incomplete; or as a source of public policy; or when determining the way in which judicial discretion was to be exercised.

The Operation of the European Convention on Human Rights in Other European Countries

5.40 In chapter 3, we surveyed the ways in which some other countries have adopted Bills of Rights in their Constitutions or separately. In this chapter we consider the ways in which other Member States of the Council of Europe have integrated the European Convention on Human Rights in their own legal systems. Again, this is no more than an overview. We have been greatly assisted by the Law Faculties of Oxford and Cambridge who submitted detailed papers as responses to our consultations. These are available in full on the Commission's website.

5.41 In chapter 4, we explained that, in the period before the Second World War, some states held firmly to the principle that rules of international law can enter the sphere of national law only by incorporation ('dualism'). Others made no such distinction, the relevant question being whether a rule of international law is such as to have direct effect in national law ('monism'), and others held intermediate positions.

5.42 The situation in Europe now is that no state, except possibly Ireland, holds so strictly to the dualist position that the rules of international law are always regarded as lying totally outside the sphere of national law. Nor is any state so purely monist as always to regard a rule of international law as 'trumping' any rule of national law.

5.43 Of greater importance in Europe today is the manner in which the legal system treats the relationship between the national Constitution and international treaties to which the state is party, especially the European Convention on Human Rights.

5.44 Before considering that question, a number of further general points need to be made.

(1) Some European states have a separate Constitutional Court, whose function is to interpret the national Constitution. The Constitutional Court is separate from all the other national courts and may be called on by them to provide an authoritative interpretation of the Constitution, which they can then apply to a case before them. In the absence of express provision in the Constitution or parliamentary legislation, it will normally be the Constitutional Court that defines the relationship between the Constitution and the European Convention on Human Rights. Where the state does not have a Constitutional Court, this task will fall to the ordinary courts.

(2) Some states have separate hierarchies of courts dealing with different types of legal issue. Each has its own internal system of appeal. Most commonly, there is one hierarchy of courts dealing with criminal and civil matters, and another dealing with issues of public law, including administrative law. The highest court in the criminal and civil hierarchy is

often called the Court of Cassation because its function is not to act as an ultimate court of appeal but to consider whether the judgment of a lower court should be "quashed" (cassé) on grounds of error of law. The highest court in the public law hierarchy is often known as the Council of State. These courts may differ in the way in which they approach the relationship between international and national law.

(3) Most European legal systems are 'codified', with separate Codes for different fields of law (Penal Code, Civil Code, etc.). Strictly speaking, the function of the courts is to interpret the relevant Article(s) of the relevant Code and apply it to the case before them. In practice, the judgments of the higher courts interpreting the Code will be regarded as authoritative, but there is no doctrine of binding precedent, as there is in the common law.

This is relevant to the way in which national courts approach the case law of the European Court of Human Rights. Except in the very rare cases brought by one state against another, cases before the Strasbourg Court are always brought by individuals against states alleging that their Convention rights have been violated by action or inaction on the part of the state(s) concerned. A judgment of the Strasbourg Court has binding force only for a state found guilty of a violation.

(4) An important concept in European jurisprudence is that of the 'hierarchy of norms'. (A 'norm' in this context is a legal rule.) Where a court is faced with several rules emanating from different sources, it is faced with a 'conflict of norms' and will have to decide which should be applied. The decision will normally depend on which rule is 'higher' in the hierarchy. Thus, almost invariably, a provision in the national Constitution will take precedence over any provision in a parliamentary statute. In that context, where there is a conflict between a provision of the European Convention on Human Rights and a provision of the Constitution or of a statute, the court will have to determine where they sit in the hierarchy of norms.

(5) What happens when a court is faced with a conflict of norms, for example between a provision of the Constitution and a parliamentary statute? Does the court have power to 'strike down' the statute? In the present context, the expression 'strike down' (taken from US law) can be misleading, since it implies that the court may 'kill' or annul the statute declaring, once and for all, that it has no status in law. Thus, section 29(1) of the Scotland Act 1998 provides that "an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament."

> There are, however, a number of ways in which courts may approach the problem of conflict of norms. At one extreme, the court may (if it has the power to do so) declare that a provision (e.g. a section of a statute) has no legal effect at all (that it is "not law"). At the other, the court may seek to reconcile the rules that appear to be in conflict by interpreting them in such a way that it is unnecessary to prefer one to the other. In between, courts have developed various techniques to deal with conflict. Perhaps the most common is to determine, by reference to their place in the hierarchy, which of two rules is 'applicable' to a given case, applying the one and disapplying the other, without declaring that the latter rule has no legal validity at all.

5.45 Against that background we consider some of the ways in which other European states have approached the European Convention on Human Rights.

Ireland

5.46 Ireland is very firmly dualist. Article 29.6 of the Irish Constitution provides that:

> "no international agreement shall be part of the domestic law of the state save as may be determined by the Oireachtas (Parliament)."

5.47 The Oireachtas has not declared the European Convention on Human Rights to be part of the domestic law of the state.

5.48 As explained in chapter 3, the Irish Constitution contains a number of provisions protecting human rights. Relatively recently, the Irish courts began to cite the European Convention on Human Rights and judgments of the Strasbourg Court as assisting in the interpretation and application of rights guaranteed by the Constitution.

5.49 The European Convention on Human Rights Act 2003 does not 'incorporate' the Convention, and the Convention remains subsidiary to the Constitution.

5.50 Section 2 of the 2003 Act, broadly following the UK Human Rights Act 1998 provides:

> "(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.
>
> (2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."

5.51 Section 3(1) of the 2003 Act provides:

> "subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

5.52 Section 3 further provides for awards of damages for breach of this obligation.

5.53 Section 4 provides that "judicial notice shall be taken of Convention provisions and… [amongst others] judgment[s] of the European Court of Human Rights." The expression "judicial notice shall be taken" implies that the Irish courts will regard judgments of the Strasbourg Court as a source of law, but not binding.

5.54 Section 5 provides for the higher courts to make declarations of incompatibility where "a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions."

Belgium

5.55 Belgium is traditionally a monist state and the Belgian courts treat the European Convention on Human Rights as having direct effect in Belgian law, taking precedence in the hierarchy of norms over national law, including the Constitution. Under the Special Law on the Constitutional Court,[127] the Court is empowered to annul, in whole or in part, a law, decree or regulation, and other courts are normally required to refer any question of constitutional validity to it.

5.56 It is not necessary to refer to the Constitutional Court where a court "finds that it appears from a judgment delivered by an international court of law that the [relevant] provision of European or international law has manifestly been infringed."[128] To that extent, in cases of "manifest infringement," the Belgian courts may treat judgments of the European Court of Human Rights as binding. Otherwise, while the European Convention on Human Rights is regularly cited as a source of law, it is not the practice of the Belgian courts to cite national or European case law in their judgments.

France

5.57 In France, Article 55 of the Constitution provides that duly ratified international treaties have the force of law superior to that of parliamentary statutes subject to the condition of reciprocity of application by the other contracting state(s). It is implicit in this provision that international treaties, including the European Convention on Human Rights, do not have force of law superior to the Constitution, and it is through the Constitution that they become part of domestic law.

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[127] Loi spéciale du 6 janvier 1989 sur la Cour Constitutionnelle (Belgium) 1989 – text available at: http://www.const-court.be/.

[128] Ibid., art. 26.

5.58 The Conseil Constitutionnel (analogous to a Constitutional Court but not, formally speaking, a court of law) has power, before enactment, to declare proposed legislation to be unconstitutional. After enactment, the Conseil d'État and the Cour de Cassation may refer a question of constitutionality to the Conseil Constitutionnel. Where the Conseil constitutionnel declares a provision to be unconstitutional, it is thereby repealed.

5.59 In current practice, French courts regularly cite the European Convention on Human Rights as a source of law, and treat the case law of the Strasbourg Court as authoritative (though not binding).

Germany

5.60 Germany is a federal state, having a federal constitution (the Grundgesetz or Basic Law) and a constitutional court (the Bundesverfassungsgericht). Each of the component Länder has its own constitution (in some cases predating the federal constitution) and, with one exception, its own constitutional court. In principle, the administration of justice is a Land competence. The courts of law are the courts of the Länder subject to the overall appellate jurisdiction of the supreme federal courts. There are separate hierarchies of courts for civil and criminal law, administrative law, tax law, labour law and social law.

5.61 Germany is formally dualist in its approach to international law. The European Convention on Human Rights became part of German law by a federal law of 1952 and is therefore directly applicable in all courts. But the federal Constitution (the Basic Law) takes precedence.

5.62 The Basic Law contains a detailed catalogue of fundamental rights and the German courts will look at an alleged violation of such rights, in the first instance, from the point of view of the Constitution rather than of the European Convention on Human Rights, which may nevertheless be invoked as a guide to the content and scope of constitutional rights.

5.63 The German Constitutional Court considers the European Convention on Human Rights and the case law of the Strasbourg Court relevant for interpretation of the fundamental rights recognised by the Basic Law provided that this does not reduce the scope of protection granted by the Basic Law. The Court considers that this is most likely to arise in what it calls "multipolar" cases involving the interests of several protected right-holders, where "more rights" for one party may imply "fewer rights" for another, unlike the generality of cases before the Strasbourg Court which are generally bilateral (X v State A). The Constitutional Court considers that, when it

comes to balancing the rights of different right-holders, the balancing process may lead to a divergence of result as between the Convention and the Basic Law.[129]

Italy

5.64 Italy has a written constitution and is traditionally a dualist state. By an amendment to the Italian Constitution in 2001, article 117(1) now provides that national and regional legislators are bound to comply not only with EU law but also with the state's international obligations. The Italian Constitutional Court has held that this amendment places the European Convention on Human Rights below the Constitution, but clearly above ordinary laws.[130]

5.65 The Constitutional Court is the only body competent to annul domestic legislation where it conflicts with the Convention. When lower courts are unable to interpret domestic law consistently with the Convention, they must refer the decision to the Constitutional Court.

5.66 The Constitutional Court has also held that the Convention must be read in the light of Strasbourg Court jurisprudence, viewing the latter as authoritative subject to the residual power of the Constitutional Court to review its compatibility with the Italian Constitution. Nevertheless, the Constitutional Court maintains a residual power to review compliance of Strasbourg Court rulings with the Italian Constitution.[131]

Spain

5.67 Spain is, generally speaking, a monist state, with a written constitution and a codified system of laws. Article 10(2) of the Spanish Constitution states that national laws regarding human rights must be understood according to the Universal Declaration of Human Rights and other international treaties and agreements ratified by Spain. The Spanish Constitutional Court has stated that Article 10(2) gives the European Convention on Human Rights a special interpretive status in Spanish Law.[132]

5.68 The European Convention on Human Rights was incorporated into the Spanish legal order by its official publication in 1979, making the Convention directly applicable and thereby binding on all courts and judges. The Convention, along with other international treaties, sits below the Spanish Constitution but above ordinary domestic law in the hierarchy of norms. The Spanish Constitutional Court has the power to

[129] See the Order of the Second Senate, 4 May 2011, 2BvR2365/09, para. 93.
[130] Corte Costituzionale (Italian Constitutional Court), *Decisions nos. 348 and 349/2007*, 22 October 2007, Gazzetta Ufficiale, 24 October 2007.
[131] Corte Costituzionale (Italian Constitutional Court), *Decisions nos. 348/2007 (no. 259)*, 22 October 2007, Gazzetta Ufficiale, 24 October 2007.
[132] Pérez, "Report on Spain" in Giuseppe Martinico and Oreste Pollicino eds., *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Groningen: Europa Law Publishing, 2010), p.460.

annul domestic laws that it finds to be inconsistent with the rights protected in the Constitution.

5.69 The Constitutional Court has traditionally been seen as a faithful follower of Strasbourg jurisprudence. However, this appears to have been somewhat diminished as the Constitutional Court has asserted greater autonomy in recent years.

Scandinavia

5.70 Scandinavian countries have written constitutions with guarantees for human rights.[133] They each adopted human rights acts incorporating the European Convention on Human Rights in the 1990s: Denmark in 1992, Sweden in 1994, and Norway in 1999. The human rights acts clarify that Convention obligations override parliamentary legislation. The Convention has been viewed as 'semi-constitutional', meaning that it sits above parliamentary legislation but below constitutional provisions in the hierarchy of norms.

5.71 Each country has different traditions for judicial review. In Sweden, there is a separate system of administrative courts, and judicial review of parliamentary legislation by the Supreme Court beginning in the 1920s became the subject of heated exchanges in the 1950s.

5.72 The Norwegian Supreme Court established judicial review of administrative action and parliamentary legislation from the 1820s.

5.73 In Denmark, while judicial review of administrative action had taken place earlier, judicial review of legislation began in the early 1900s, but with the courts remaining more deferential to Parliament.

5.74 In Sweden, judicial review of parliamentary legislation was previously limited to 'clear' breaches, to prevent the new role of the courts, including the Supreme Court, from upsetting the balance of powers. However, in 2010, the limitation to 'clear' breaches was removed, including for breaches of the European Convention on Human Rights.

5.75 The Norwegian Supreme Court for a short period required that only a 'clear' breach of the Convention could allow it to override parliamentary legislation and acts of the executive. This requirement had been discussed in the legislative process leading up to the Human Rights Act 1999 but was not adopted in the Act and was expressly rejected by the Supreme Court in 2002.

5.76 As noted in chapter 3 above, a Commission recommended in 2011 that all human rights provisions should be grouped together in a single chapter of the Constitution,

[133] See ch. 3 for further discussion.

taking into account the situation in other western European countries and international human rights instruments, including the European Convention on Human Rights. The Commission proposed that a new Article 114, providing that the courts would have the "right and duty to examine whether the law and other decisions of the authorities of the state conflict with the Constitution." This is still under discussion and has been the subject of some controversy.

5.77 In Denmark the situation is less certain – it is assumed rather than expressly provided that the Danish Supreme Court has the power to declare a statute unconstitutional and therefore inapplicable. No reforms are underway in Denmark and the text of the Constitution has not been amended since its adoption in 1953.

The Charter of Fundamental Rights of the European Union

5.78 European Union laws impact on many areas of public policy in this country such as the environment, trade, immigration, health, transport, policing, agriculture and technological development. At times, the operation of these and other laws from Europe touch on areas concerning the fundamental rights of individuals. For that reason, the way in which fundamental rights are recognised under European Union law – most notably now under the Charter of Fundamental Rights of the European Union – also forms part of the landscape of human rights in the UK.

The rights in the Charter

5.79 The Charter of Fundamental Rights of the European Union was initially proclaimed in December 2000 and became binding in December 2009 as part of the Lisbon Treaty. It contains 50 rights drawn from a wide range of existing international, European and domestic instruments. These rights are arranged under six headings: dignity, freedoms, equality, solidarity, citizens' rights and justice. The Charter includes the right to life and the prohibition of torture but also rights such as the protection of personal data, social and workers' rights and rights for children and the elderly. The range of rights in the Charter is thus much wider than those found in the European Convention on Human Rights.

5.80 The main purpose of the Charter was to bring together into one document all the fundamental rights already recognised in European Union law, including those contained in the European Convention on Human Rights.

5.81 Prior to its recognition in the Lisbon Treaty, the European Court of Justice[134] made reference to the Charter in its rulings, but the legal status of the Charter was

[134]The Court of Justice of the European Union is one of the institutions of the European Union. At present, it comprises three courts: the Court of Justice (commonly, though inaccurately, referred to as "the European Court

uncertain. Article 6(1) of the Treaty on European Union now provides that the rights, freedoms and principles set out in the Charter have the same legal value as the Treaties. This means that, as with other principles of EU law, the institutions of the European Union (such as the European Commission or European Parliament) must not act in ways that are inconsistent with the rights set out in the Charter. The Court of Justice can declare invalid legislation that is incompatible with the Charter.

The impact of the Charter in the United Kingdom

5.82 According to settled case law, EU law takes precedence over any national laws and thus Member States must interpret their national law, including secondary legislation, in a manner consistent with EU law, including the fundamental rights protected by the European Union legal order. In addition, under Article 51 of the Charter, Member States of the European Union must act consistently with the Charter when they are implementing EU law.

5.83 The Charter was not intended to create any rights in the national laws of the UK or in other Member States of the European Union that did not already exist as a matter of EU law. The Preamble refers to the Charter making existing rights more "visible" and the Charter includes provision to the effect that it does not amend existing EU law in any way. The rights in the Charter only come into play when the law in question is governed by EU law. So the Charter has no effect in respect of issues of purely domestic policy.

5.84 When the Charter was being negotiated among Member States, both the United Kingdom and Poland requested specific confirmation that the Charter would not lead to certain rights in the Charter becoming directly enforceable in their domestic law and sought assurance that the Charter did not extend the existing powers of the courts on human rights matters. These assurances were given in a protocol to the Charter.[135]

5.85 There is a range of views on the actual effect of the joint United Kingdom-Poland Protocol. Some consider that the Protocol is an opt-out that excludes the application of the Charter to Poland and the United Kingdom. Others are of the view that the Protocol is merely interpretive and has either limited or no legal consequence.

5.86 The scope of the Protocol and the impact of the Charter, including its relationship to the European Convention on Human Rights, have been explored in the context of some early case law under the Charter. In a recent case concerning the Common European Asylum System, the Court of Appeal asked the Court of Justice to rule on whether the Protocol to the Charter affected the extent to which an asylum seeker

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of Justice"), the General Court and the Civil Service Tribunal. All three Courts may refer to the Charter in their judgments.

[135] Protocol (No. 30) on the Application of the Charter of Fundamental Rights to Poland and to the United Kingdom, [2010] OJ C83/313.

could rely upon his Charter rights in contesting the Government's decision to remove him from the United Kingdom to Greece. The Court of Justice ruled that Article 1(1) of the Protocol did not intend to exempt the United Kingdom from the obligation to comply with the Charter, or to prevent a UK court from ensuring compliance with its provisions.[136] This judgment has since been followed by the Court of Appeal.[137] However, it left open the question of whether Article 1(2) of the Protocol prevents a UK court from ensuring compliance with the social and workers' rights set out under Title IV of the Charter. Article 1(2) of the Protocol states that Title IV of the Charter does not contain justiciable rights.

5.87 As has been pointed out, Article 51 restricts the application of the Charter to the Member States "only when they are implementing Union law." However, this phrase in practice gives the Charter very wide application, since a Member State will be regarded as implementing EU law when it is acting within the scope of an EU regulation or directive. A recent illustration is that whenever a court makes an order which results in the disclosure of personal data, the court is bound to act in accordance with the principles of the Charter including its Article 8 on the protection of personal data.[138] The reason for linkage with EU law is that the EU's Data Protection Directive imposes obligations on Member States regarding the protection of personal data and so the circumstances in which personal data may legitimately be disclosed fall within the ambit of EU law.

5.88 A further illustration of the width of application of the Charter is that it can be used as a basis for altering the meaning of, or even invalidating parts of, an EU regulation or directive which binds the United Kingdom. The United Kingdom is then as a matter of EU law bound by the regulation or directive in its altered form. An important example of this is that the United Kingdom negotiated the inclusion of a specific provision in a directive on sex equality in the supply of goods and services which permitted in the field of insurance "proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data."[139] However the Court of Justice ruled[140] that the article in the directive permitting the continuation of sex-based insurance premiums was invalid as contrary to the provisions of the Charter on sex equality. In consequence, the UK in common with other Member States is required to prohibit the charging of insurance premiums based on e.g. the very large differences in the statistical likelihood of accidents between young male and female drivers.

[136] *NS v. Secretary of State for the Home Department*, C-411/10 [2012] All ER (EC) 1011 (Court of Justice of the European Union (Grand Chamber)).
[137] *EM and MA (Eritrea) v. Secretary of State for the Home Department* [2012] EWCA Civ 1336.
[138] *Rugby Football Union v. CIS Ltd (formerly Viagogo Ltd)* [2012] UKSC 55, where the Supreme Court held that the making of the particular order for disclosure in the case was consistent with Article 8 of the Charter.
[139] Art. 5(2) of Directive 2004/113.
[140] Case C-326/09, 1 March 2011.

5.89 These examples illustrate that the Charter already has wide application and that its effects will persist and are likely to grow within the field covered by EU law.

EU Accession to the European Convention on Human Rights

5.90 The European Union has 27 Member States, all of whom are Member States of the Council of Europe. The Council of Europe has an additional 20 members from other European states. Even though all EU Member States are signatory states of the European Convention on Human Rights, the European Union and the Council of Europe have agreed that the European Union should accede to the Convention as a signatory in its own right. Article 6(2) of the Treaty on European Union provides that the Union shall accede to the European Convention.

5.91 The intention of EU accession is that where there are violations of human rights for which EU institutions are responsible (as opposed to Member States), either through their legislation or their other actions, the EU should be held accountable. This is thought to be important because the EU makes many laws and decisions that impact directly on the lives of EU citizens and the realisation of their rights.

5.92 EU accession might also involve EU institutions being joined as co-defendants to proceedings before the Strasbourg Court, where a Council of Europe Member State asserts that the alleged violation occurred by virtue of an obligation under EU law.[141] EU citizens will then be able to take action against both the state and a European Union institution alleging breaches of Convention rights. This would be relevant to situations such as occurred in the case of *Matthews v. UK*,[142] where the UK was held to have violated the Convention by failing to allow residents of Gibraltar to participate in EU Parliamentary elections. This exclusion had occurred by virtue of a provision of EU law.

5.93 The process of accession to the Convention is yet to be completed. It requires unanimous agreement by the European Council, the consent of the European Parliament and approval by all 47 of the existing signatory states to the Convention. Negotiations between these parties are still ongoing and many components of accession and its impact on EU law and on the Convention system are yet to be determined.

[141] See 'Draft Legal Instruments on the Accession of the European Union to the European Convention on Human Rights', Document CDDH-UE (2011)16 of 19th July 2011, Article 3.2, available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents/CDDH-UE_2011_16_final_en.pdf.

[142] App. No. 24833/94, judgment of February 18th 1999.

Chapter 6: Human Rights in the UK

The UK's Rights Heritage: The Common Law and Statute Law prior to the Human Rights Act 1998

Introduction

6.1 When the topic of human rights is discussed, many people in the UK think automatically of the Human Rights Act 1998 and the European Convention on Human Rights, which was adopted in 1950. But, in fact, the UK pioneered many concepts of human rights long before these instruments came into being. Indeed the UK's rich heritage of rights protections stretches back many centuries to rules pronounced by judges or by Parliament in some of this country's first statutes.

6.2 This section describes the foundational – and continuing – role played by both early rights instruments and other legislation, and by the common law, in protecting the rights of individuals in the UK.

Historical instruments and other legislation

6.3 Despite the absence in the United Kingdom of a written constitution, the notion of setting out basic rights in a formal declaration has a long and rich history in this country. In chapter 3 we drew attention to the historic instruments that have, collectively, provided some of the essential elements of a Bill of Rights for the United Kingdom, especially Magna Carta, the Habeas Corpus Acts, the Bill of Rights and the Claim of Right.

6.4 During the seventeenth and eighteenth centuries, many legal theorists argued that the rights of citizens were so well protected by these historic instruments and by the common law (discussed below) that there was no need for a comprehensive constitutional instrument or bill of rights. In the years that followed, Parliament (and judges when determining the outcome of cases) continued to recognise and evolve the basic rights of individuals in a similarly piecemeal – but still constitutionally important – manner. For example, the Reform Acts of 1832, 1867 and 1884 accorded wider voting rights and the Equal Franchise Act of 1928 gave women equal voting rights to men; the Roman Catholic Relief Act 1829 accorded greater religious freedom to Roman Catholics; the Education Act 1944 recognised a right to education; and the Murder (Abolition of Death Penalty) Act 1965 ensured more complete protection of a right to life.

6.5 In the latter half of the twentieth century, the enactment of anti-discrimination legislation represented fundamental steps in developing equality laws in different parts of the United

Kingdom. These included the Race Relations Act 1965, which prohibited unlawful racial discrimination; the Sex Discrimination Act 1975, which made certain types of gender discrimination unlawful; the Equal Pay Act (Northern Ireland) 1970, which provided for equal pay between men and women; and the Disability Discrimination Act 1995 which prohibited unlawful discrimination against people with disabilities.

6.6 In our common law system judges determining a case in court are required to interpret these historic and more recent statutory provisions against the backdrop of pre-existing common law and custom. Together with wider developments in other areas of law, the judiciary in this regard continues to contribute to the incremental development of the common law, which we consider in the next section.

The common law

6.7 One of the most distinctive features of the legal system in the United Kingdom is the reliance on the creation and evolution of laws declared by judges. Through the centuries, it was not only the parliaments of the countries of the UK that enacted rules governing relations between individuals, and affording rights protections, but very often judges as they declared laws based on customs and decided all manner of cases that came before them in court.

6.8 This flexible body of rules affirmed by judges is known as the 'common law',[143] and its development, including the way in which it has historically protected fundamental rights, continues to this day. This development is separate from, but recently influenced by, the way in which rights are protected under instruments like the European Convention on Human Rights and the Human Rights Act 1998.

6.9 Many of the basic rights and freedoms often spoken about today originally come from the common law (there is more than one legal jurisdiction within the United Kingdom and references to the 'common law' in this chapter do not attempt to elucidate the numerous differences of substance and terminology between the common law of Scotland, the common law of Northern Ireland and the common law of England and Wales).

6.10 To give some examples the right to life has long been protected under the criminal law

[143]The term 'common law' was once famously defined by Blackstone (*Blackstone's Commentaries on the Laws of England* (*1765-1769)* Oxford: Clarendon Press) as: "the common sense of the community, crystallised and formulated by our forefathers…the chief cornerstone of the laws of England which is general and immemorial custom, or common law, from time to time declared in the decision of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law." The expression 'common law system' is used to characterise the legal system of the UK, the USA and most countries of the Commonwealth, as distinct from the 'civil law systems' of France, Germany and other countries in Europe and throughout the world.

through common law offences such as murder and manslaughter.[144] The right to personal liberty and security has long been recognised by the common law through offences created under the criminal law such as assault and battery, as well as the similar private law torts of assault and battery. Tort law is an area derived from common law principles that govern obligations between individuals. It contains further protections such as the right against forced labour through the tort of false imprisonment.

6.11 Other common law rights have been affirmed by judges in cases both before and after the enactment of the Human Rights Act 1998. The right of access to a court was affirmed in 1920 in the seminal case of *Chester v. Bateson*[145] where it was robustly defended even when limited by statute in order to further a war effort.[146] The right has been extended further in subsequent cases to encompass a right of access to justice.[147]

6.12 Rights to jury trial and other procedural rights within the common law systems can also trace their roots back to early judicial decisions and ancient texts.[148] Thus, the common law has protected the right to a fair hearing before an unbiased court or tribunal "for so long that it hardly requires citation of authority."[149] The common law in this area continues to develop. For example the House of Lords held that, in England, the test for determining apparent bias on the part of the decision-maker should reflect developments in the case law of Scotland and from Commonwealth countries.[150]

6.13 The right to property is a deeply entrenched common law right. It is protected in a number of ways, including through the law of trespass. In the eighteenth century case of *Entick v. Carrington*,[151] it was observed that property "is preserved sacred and incommunicable" apart from where it is abridged by Parliament. In that case it was held that the common law right to property restricted the power of the Secretary of State to issue general warrants for the arrest and search of those publishing seditious papers. By extension of the right to property, the common law has also been held to

[144]These common law offences are however now regulated to a certain extent by statute, for example, the Homicide Act 1957.
[145][1920] 1 KB 829.
[146]See also the case of *Anisminic v. FCC* [1969] 2 AC 147; [1969] 2 WLR 163 which highlighted the strength of the right of access to the courts in the face of an apparently wide ouster clause, which was held not to preclude such access where the administrative decision was a nullity.
[147]For example in *R (on the application of Daly) v. SSHD* [2001] UKHL 26, the House of Lords upheld the fundamental common law right to privileged legal correspondence and held that a rule which permitted a prison officer to search a prisoner's cell and privileged correspondence was unlawful. See also *R v. SSHD Ex p. Simms* [2000] 2 AC 115 where the House of Lords held that the right at common law allowed prisoners to meet investigatory journalists to further claims that they have been the victims of a miscarriage of justice.
[148]A right to jury trial in particular raises complex questions about the scope of any such right across the different legal systems of the United Kingdom.
[149]Beatson, Grosz, Hickman, Singh and Palmer, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008), paras. 1-30.
[150]*Porter v. Magill* [2001] UKHL 67.
[151](1765) St Trials 19 1029 at para. 1066.

include a fundamental right to privacy of the home.[152]

6.14 Irrespective of the prohibition on torture in Article 3 of the European Convention on Human Rights and a number of other international instruments, the House of Lords[153] acknowledged in a high profile case that "from its very early days" the common law "set its face firmly against the use of torture." In a similar vein, the House of Lords held that in the field of freedom of speech there was no difference in principle between the common law right and the right to freedom of expression in Article 10 of the European Convention on Human Rights.[154]

6.15 More recently in a case concerning access to court documents the common law principle of open justice was recognised as separate from the scope of any freedom to receive and impart information under Article 10. It was described as a "constitutional principle to be found not in a written text but in the common law."[155]

6.16 In addition to identifying these and other rights in the common law, judges used a number of common law principles when interpreting legislation and when reviewing the actions of public authorities in ways that ensured minimal intrusion into those rights and freedoms. For example in accordance with the 'principle of legality' the starting point for courts when interpreting a piece of legislation is to assume that Parliament did not intend to legislate inconsistently with the rights of individuals as recognised in the common law or elsewhere.[156]

6.17 A further important source of human rights within the common law are those principles derived from customary international law which comprise the duties on States arising not from a treaty or other agreement but through previous state practice and custom. Examples of such well-established concepts include the prohibition of torture[157] and the prohibition of racial discrimination.[158]

The limits on the protection of the common law

6.18 Despite the historic achievements of the common law in developing fundamental rights, there were and continue to be a number of significant limitations to its capacity to provide comprehensive protection.

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[152] *Morris v. Beardmore* [1981] AC 446 at para. 456 per Lord Diplock; para. 465-64 per Lord Scarman; (1980) 71 Cr.App, R. 256.
[153] *A v. Home Secretary (No 2)* [2005] UKHL 71, per Lord Bingham paras. 11-12.
[154] *Derbyshire County Council v Times Newspapers Ltd.* [1993] 2 WLR 449.
[155] *R (on the Application of Guardian News and Media Limited) v. City of Westminster Magistrates Courts* [2012] EWCA Civ 420.
[156] In order to interfere with these rights, the Government was required to draft legislation in wholly unequivocal and unambiguous terms. The principle of legality is seen as the common law's analogue of the statutory duty in section 3 of the Human Rights Act 1998.
[157] *A v. SSHD (No 2)* [2005] UKHL 71; [2006] 2 AC 221.
[158] *R (on the application of European Roma Rights Centre) v. SSHD* [2004] UKHL 55; [2005] 2 AC 1.

6.19 First, the traditional approach in this country to protecting rights was mainly based, not on the recognition of positive individual rights but on the more negative concept of liberty in accordance with which individuals have the right to do what they like, unless restrained by the common law or by statute, and public authorities may infringe the freedom of the individual only if they are allowed to do so by some specific law. Before the recognition of fundamental positive rights in the common law, rights were therefore traditionally seen by many as residual in nature and the lack of any positive cause of action to defend them did not always result in their effective protection.

6.20 Another constraint on the protection of human rights by the common law has been the fact that Parliament has always had the ultimate power to change it. For example when Parliament created the new offence of 'trespassory assembly' in the Criminal Justice and Public Order Act 1994, it restricted the right to freedom of assembly that the common law had developed. On this issue, Lord Scarman famously argued that the common law was no longer capable of protecting individual liberties from an increasing amount of Government legislation. He observed that the risk of legislation infringing common law rights was notably higher in times of social tension or economic crisis.[159]

6.21 Finally courts have arguably been unable to extend the scope of common law protection into completely new fields since the power of the courts is limited to incremental development of existing law.

6.22 These constraints – together with the growing number of instruments at the international level seeking to protect human rights and a number of legal and political factors – helped make the case for incorporation of the European Convention of Human Rights into UK law through the Human Rights Act 1998. Prior to the enactment of the Human Rights Act, however, there were many who questioned the need for it on the grounds that the common law had been doing a more than adequate job protecting the human rights of individuals in the UK for centuries, including in particular since the UK's ratification of the European Convention on Human Rights in 1953 required the UK Government to protect and implement the Convention rights. One commentator observed that the adoption of the Human Rights Act 1998 was "not so much a sea-change as a legislative endorsement of a long-running politico-legal trend."[160]

[159]Scarman, *English Law – The New Dimension*, The Hamlyn Lectures (London: Stevens & Sons, 1974).
[160]Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd ed. (Oxford: Oxford University Press 2002), p. 79.

The Human Rights Act 1998

Introduction

6.23 The Human Rights Act 1998 gives direct effect in UK law to rights contained in the European Convention on Human Rights – an international treaty which we have discussed in more detail in chapter 5 of this report. Since the Human Rights Act came into force in October 2000 individuals in the UK have been able to rely on Convention rights in domestic courts with recourse to the Strasbourg Court only if our courts have rejected the claim.

6.24 In contrast to the UK prior to 2000, most Member States of the European Convention on Human Rights had a system that enabled individuals to seek a remedy in their domestic courts for breaches of their Convention rights[161] without having to go to the Strasbourg Court, at least in the first instance. In the UK, however, although there were obligations imposed by international law to comply with the Convention, individuals could not rely directly upon the Convention rights in UK courts, because they had not been incorporated by Parliament into domestic law.

6.25 This section explains the background to the enactment of the Human Rights Act and its key provisions.

Background

Incorporation of the Convention

6.26 Prior to the Human Rights Act, although there were in many cases no effective domestic remedies for individuals in the UK who alleged that their Convention rights had been breached, the European Convention on Human Rights had an indirect influence on the development of the common law and the interpretation of legislation. The courts applied the presumption that Parliament had intended when enacting legislation to comply with the UK's treaty obligations including those under the Convention. Despite this impact there were increasing calls for 'incorporation'[162] of the Convention rights into domestic law by passing an Act of Parliament.

6.27 Some opposed incorporation, or at least had concerns about the impact this would have on important principles of the UK constitution, such as Parliamentary sovereignty and the separation of powers between the three branches of government (the

[161] This is because the Convention had either been incorporated into domestic law (for example through a written constitution) or because the country had a monist system of law whereby the Convention, as an international treaty, had an equal status to domestic legal instruments.

[162] There is debate about whether the Human Rights Act 1998 'incorporated' Convention rights or rather gave direct domestic effect to these rights. We have not attempted in this report to discuss this issue and have simply used the term 'incorporated'.

executive, the legislature and the judiciary). They were concerned that if domestic courts were empowered to rule on the compatibility of legislation and ministerial acts with the Convention, the balance of power would tip too far toward the courts at the expense of government and elected legislators. They considered that it was beyond the proper province of the judiciary to decide policy issues that were matters to be decided by the democratically elected Parliament and that it was undesirable to constrain the administrative discretion of public authorities. They also believed that the common law protected Convention rights adequately without any further legal instruments being required.

6.28 On the other hand, those in favour of incorporation sought to give direct effect in UK law to the Convention rights. They believed that there were gaps in the protection afforded by the common law and statute law and that there were unnecessary obstacles in obtaining speedy and effective redress because victims had to seek remedies in the Strasbourg Court which could be time-consuming and expensive. They also believed that the UK would benefit from a statutory code that protected basic civil rights and liberties against the misuse of public power and promoted the ethical and civic values of a modern democratic society. Some of the proponents of incorporation also saw it as a stepping stone to a Bill of Rights as part of a new constitutional settlement.

The road to the Human Rights Act

6.29 What became a campaign for incorporation of the Convention was affected by the implications of the passage of the Commonwealth Immigrant Act 1968, which gave rise to the *East African Asians case.*[163] The 1968 Act was passed in only three days as an emergency measure to deny British Asians, who had been expelled from East Africa, entry to the UK as their country of citizenship. The European Commission of Human Rights found that Parliament had breached Article 3 of the Convention because the 1968 Act subjected the British Asian passport-holders to inherently degrading treatment by excluding them on racial grounds. This case brought into sharp relief what some thought amounted to a crisis of faith in the ability of the common law to define and protect the rights of vulnerable minorities.

6.30 There were also growing concerns about what Lord Hailsham of St Marylebone, Lord Chancellor twice in the 1970s and 1980s, had defined as an ‘elective dictatorship’ (also known as executive dominance). In other words, the government of the day dominates Parliament by virtue of the large majorities typically secured under the first-past-the-post electoral system. The fear was that governments in such a strong position might not respect fully the interests of minorities in societies which would, de facto, never enjoy enough voting power to hold sway over popular governments.

[163] *East African Asians v. UK* (1973) 3 E.H.R.R. 76.

6.31 Throughout the 1980s, there were continuing concerns that large electoral majorities made it possible for the executive to push through controversial pieces of legislation – such as the Public Order Act 1986 – which some felt paid too little regard to the protection of rights.

6.32 By the early 1990s, landmark cases in the Strasbourg Court involving the UK were steadily challenging the view that the UK system – and the common law in particular – afforded an adequate protection of rights. There was also a view that the Convention and the Strasbourg Court were having such a significant impact on UK law that incorporation was needed in order to allow UK courts to directly influence the impact of the Convention.

6.33 Over the period of the 1970's to 1990's, various proposals were made for the adoption of a UK Bill of Rights or the incorporation of the European Convention on Human Rights into UK law. Such proposals came from members of the political parties and from independent bodies, inside and outside Parliament.

6.34 After the 1997 General Election, the Home Secretary Jack Straw MP published a White Paper, *Rights Brought Home: the Human Rights Bill*. The proposed Bill was part of a package of democratic renewal being advanced by the Labour party, including devolution, freedom of information, and House of Lords reform. Incorporation was envisaged providing effective domestic remedies for breaches of the Convention rights by empowering UK courts and tribunals to adjudicate directly on Convention issues, while still allowing final recourse to the Strasbourg Court. This would allow the Convention rights to be "far more subtly and powerfully woven into our law" whilst also allowing British judges to make a "distinctly British contribution to the development of the jurisprudence or human rights in Europe."[164]

6.35 The Human Rights Bill received Royal Assent in November 1998 and came into force on 2 October 2000. During the period before its was brought into force there were detailed judicial and civil service training programmes to prepare for the changes involved.

The Human Rights Act: how does it work?

6.36 The main objects of the Human Rights Act were to enable the UK to be better able to fulfil its international obligations under the Convention and to provide effective domestic remedies for alleged violations of the Convention rights. The way in which this is done is by:

a) requiring all public authorities – including central government, local authorities, the police, prisons, NHS trusts and the courts and

[164]White Paper, *Rights Brought Home: the Human Rights Bill*, 1997, Cm 3782, para. 1.14.

tribunals – to respect and act in accordance with Convention rights in all that they do;

b) enabling individuals to take legal action in the UK courts if they consider that their Convention rights have been breached; and

c) requiring UK courts and tribunals:

i) to read and give effect to legislation, so far as is possible, in a way that is compatible with Convention rights. In the case of the senior courts, there is the power to declare a statutory provision that cannot be read in this way to be incompatible with the Convention rights; and

ii) to act compatibly with the Convention rights in performing functions of a public nature.

The Convention rights

6.37 The Convention rights are defined by section 1 of the Human Rights Act as Articles 2 to 12 and 14 of the Convention, Articles 1 to 3 of the First Protocol; Articles 1 and 2 of the Sixth Protocol all read with Article 16 to 18 of the Convention. The Convention Rights set out in the Human Rights Act include the right to life, the prohibition on torture, the right to liberty and security, the right to a fair trial, the right to respect for private and family life and freedom of expression.

6.38 The Human Rights Act 1998 does not include all rights that now appear in the Convention and its Protocols. It omits Article 1 (the obligation to secure the Convention rights) and Article 13 (the obligation to provide effective domestic remedies) on the ground that it was considered unnecessary to do so because the Act itself gives effect to them. Nor does it include rights set out in a number of Protocols to the Convention that the UK has not ratified. The full text of the Human Rights Act 1998 is included in volume two of this report.

The role of the courts and Parliament

6.39 Under the Human Rights Act senior courts have the power to nullify secondary legislation and declare acts of public authorities unlawful, but they lack the power (which they have under the European Communities Acts in relation to legislation incompatible with European Union law) to displace primary legislation which is incompatible with Convention law. Instead, the Government struck what was described as a "careful compromise"[165] between the role of the courts in interpreting and applying the law and the sovereignty of the UK Parliament in making the law. This compromise is found in section 4 of the Act, which gives the higher courts the power

[165]Geoffrey Hoon MP, Parliamentary Secretary at the Lord Chancellor's Department, House of Commons Committee Stage, 313 HC Official Report, 3 June 1998, 6th series, col. 458.

to declare a provision of primary legislation to be incompatible with a Convention right where the court finds it impossible to interpret the provision in a way that is compatible. A declaration of incompatibility does not affect the validity, continuing operation or enforcement of the legislative provision in question. Nor is it binding on the parties to the proceedings in which it is made. Rather, this mechanism brings to the attention of Government and Parliament the fact that legislation is incompatible with Convention rights. It is then up to Parliament to decide what action to take, if any, in response to that declaration.[166]

6.40 Although the Human Rights Act gives Parliament the final say as between domestic courts and Parliament, an individual can still petition the Strasbourg Court for a remedy. The Home Secretary observed during the parliamentary passage of the Human Rights Bill that:

> "in most cases, Parliament and Government will wish to recognise the force of a declaration of incompatibility by the High Court. Let us suppose that a case goes to Strasbourg, where the European Court decides that an action by the British Government, or the British Parliament, is outwith the Convention. According to 50 years of practice on both sides, we always put the action right, and bring it into line with the Convention. One of the questions that will always be before Government, in practice, will be, 'Is it sensible to wait for a further challenge to Strasbourg, when the UK courts have declared the provision to be outwith the Convention?'"[167]

6.41 Ministers envisaged that declarations of incompatibility would be "rare… as in almost all cases, the courts will be able to interpret legislation compatibly with the Convention."[168] Since the Human Rights Act 1998 came into force in October 2000, some 19 declarations of incompatibility have been made by the courts.

The UK courts and the Strasbourg Court jurisprudence

6.42 The nature of the UK courts' relationship with the jurisprudence of the Strasbourg Court was also addressed by the Human Rights Act. Section 2 provides that a court or tribunal determining a question which has arisen in connection with a Convention right "must take into account" a judgment or decision of the Strasbourg Court. So far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.[169] UK courts are therefore under a duty to consider relevant cases

[166]Such action may include passing new primary legislation. Section 10 of, and Schedule 2 to, the Human Rights Act 1998 provide a fast-track procedure whereby the Government can act to amend legislation to remove the incompatibility with the Convention in response to a declaration of incompatibility.
[167]Secretary of State for the Home Department, Mr Jack Straw, HC 16 February 1998, col. 773.
[168]Secretary of State for the Home Department, Mr Jack Straw, HC 16 February 1998, col. 780; and The Lord Chancellor, Lord Irving of Lairg, HL 3 November 1997, col. 1231.
[169]S. 2(1)(a). This duty extends to any opinion or decision of the former European Commission on Human Rights, and any decision of the Committee of Ministers (s. 2(1)(b)-(d)).

from the Strasbourg Court when making decisions but they are not bound by them.[170]

6.43 During the passage of the Human Rights Bill concern was expressed that this provision would unduly increase the influence of the Strasbourg Court decisions in cases before the UK courts. However, the Government explained that it was intended that UK courts could "depart from existing Strasbourg decisions and upon occasion it might well be appropriate to do so, and it is possible they might give a successful lead to Strasbourg."[171] It was also explained that "the interpretation of the Convention rights develops over the years. Circumstances may therefore arise in which a judgment given by the European Court of Human Rights decades ago contains pronouncements which it would not be appropriate to apply to the letter in the circumstances of today in a particular set of circumstances affecting this country."[172]

6.44 Indeed, the Government's intention that section 2 would not prevent UK courts from adopting a different approach to that adopted by the Strasbourg Court on the same issue was confirmed by its rejection of an amendment to the Bill that would have made the Strasbourg Court case law binding on UK courts.[173]

6.45 Some commentators have expressed concern, however, that this duty has been interpreted in practice by the courts in a way that has caused them to apply the Strasbourg Court judgments too rigidly as if they were binding precedents without sufficient consideration of domestic circumstances. In support of that view, they quote the words of Lord Rodger in *AF*[174] "Strasbourg has spoken, the case is closed."[175] However, other commentators point to more recent decisions such as *Doherty*[176] and *Horncastle*[177] to support their view that our domestic courts are increasingly distinguishing or departing from the Strasbourg Court case law where they consider this to be justified and appropriate. In those cases, the House of Lords and the Supreme Court considered directly relevant case law from the Strasbourg Court but

[170]The scope of section 2 was described by Lord Bingham in the case of *R (Ullah) v. Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, at para. 20, namely that "the duty of national courts [was] to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less." However, it is doubtful that this statement was intended to interpret section 2 of the Human Rights Act as requiring our courts to treat the jurisprudence of the Strasbourg Court as creating binding precedents.

[171]Lord Chancellor, Lord Irvine of Lairg, Committee Stage of the Bill in the House of Lords, 583 HL Official Report, 18 November 1997, 5th series, cols. 514-515.

[172]Lord Chancellor, Lord Irvine, Report Stage in the House of Lords, 584 HL Official Report, 19 January 1998, 5th series, cols. 1270-1271.

[173]Amendment by Lord Kingsland from the Opposition Front Bench, HL Deb 18 November 1997, vol. 583, cc 490-527.

[174]*Secretary of State for the Home Department v. AF and others* [2009] UKHL 28.

[175]Commenting on the impact of the Strasbourg Court's decision in *A v. UK* on the case of *AF*, Lord Rodger stated: "Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentoratum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed."

[176]*Doherty v. Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2008] UKHL 57, [2008] 3 WLR 636.

[177]*R v. Horncastle and others (Appellants) (on appeal from the Court of Appeal Criminal Division)* [2009] UKSC 14.

declined to follow the Strasbourg Court's decisions on reasoned bases. In recent evidence to a Parliamentary committee, Lord Phillips, the then President of the Supreme Court stated: "If the wording 'take account' gives a message at all, it is that we are not bound by decisions of the Strasbourg Court as binding precedent."[178]

Particular direction to courts on specific rights

6.46 The Human Rights Act sets out other guidance to the courts. Sections 12 and 13 recognise that certain Convention rights can come into conflict, such as the right to freedom of expression under Article 10 and the right to personal privacy under Article 8, and a number of rights that potentially impact on the right of a religious organisation to exercise its freedom of thought, conscience and religion. Sections 12 and 13 require the courts, when considering whether to grant relief, to pay particular regard, respectively, to the importance of the rights to freedom of expression and the right to freedom of thought, conscience and religion. During the passage of the Human Rights Bill, the churches and the press had been concerned to ensure that the particular liberties that they perceived as important received adequate protection as a result of the Act. Sections 12 and 13 were added as late amendments to the Bill in order to meet those concerns.

Duty on public authorities

6.47 A cornerstone provision of the Human Rights Act, in particular in its practical impact for individuals and on public authorities throughout the UK, is section 6, which places a duty on all public authorities to act compatibly with the Convention rights unless, as a result of primary legislation, they could not have acted differently. This includes hospitals, the police, prisons, courts and local authorities.

6.48 Many consider this duty to be of fundamental importance. The Commission was told by many of those who responded to our consultations and by many of those with whom we met that the section 6 duty had had a positive impact on the everyday lives of individuals. The British Institute of Human Rights stated in its response to the Commission's Discussion Paper that "the section 6 Human Rights Act duty can be a primary lever of change in taking human rights beyond the courtrooms and into everyday settings. This duty is a catalyst for public services to practice prevention rather than cure and empowers staff to challenge and change practices and policies."[179]

[178] Oral Evidence on Human Rights Judgments, 15 November 2011, HC-873 ii.
[179] Para. 14.

6.49 This means that it is not only Parliament's laws that are scrutinised by the courts for their compatibility with the Convention, but also executive actions, including those delegated to organisations and agencies, judicial actions, and actions carried out under legislative authority. There is a view among some that this duty (as with health and safety) has unnecessarily inhibited public authorities and has increased expensive bureaucracy.

6.50 Under the Human Rights Act a 'public authority' includes any person or body that exercises some public functions. During the passage of the Human Rights Bill in Parliament the then Lord Chancellor, Lord Irvine of Lairg stated that the Government had decided that it "should apply the Bill to a wide rather than a narrow range of public authorities, so as to provide as much protection as possible to those who claim that their rights have been infringed."[180]

6.51 The term "public authority" has been interpreted by the courts to include some but not all private bodies to whom the running of public services have been outsourced. As the Joint Committee on Human Rights noted in its report on the meaning of public authority:

> "In a series of cases relating to delivery of public services by private suppliers… the UK courts have adopted a restrictive interpretation of the meaning of public authority, potentially depriving numerous, often vulnerable people, such as those placed by local authorities in long term care in private care homes or living in accommodation rented from registered social landlords, from the human rights protection afforded by the HRA."[181]

6.52 The House of Lords decision in *YL v. Birmingham City Council and Others*[182] excluded from the scope of the section 6 duty, private companies that provided residential care under contracts with a local authority.[183] The Government then passed section 145 of the Health and Social Care Act 2008 in order to clarify the scope of the Human Rights Act 1998 in respect of certain care services.

6.53 Courts are also 'public authorities' for the purposes of the Human Rights Act 1998 and are therefore under the same statutory duty as other public authorities to act in a

[180] *House of Lords Official Report*, 3 Nov 1997, vol. 582, col. 1227-312.

[181] Joint Committee on Human Rights, *The Meaning of Public Authority Under the Human Rights Act*, Ninth Report of Session 2006-7, HL Paper 77, HC 410, p. 3.

[182] [2007] UKHL 27.

[183] In that case an individual had been placed in the care home by a local authority in pursuance of a statutory obligation incumbent upon it to provide care. Rather than provide the care directly, the authority paid the fees for care in the care home under a service provision contract. The authority was not otherwise involved in running the home or directly subsidising it. The case was decided by the House of Lords on a narrow majority of three to two. The majority distinguished between a case where a local authority runs a care home or subsidises a home directly from public funds and a case, such as YL, where the local authority simply paid the fees for care under a contract with a private company.

manner compatible with Convention rights.[184]

Statements of compatibility

6.54 A further provision which affects the constitutional balance of power between the executive branch and the legislative branch of the UK Government is section 19 of the Human Rights Act 1998. This provision requires the Minister in charge of a Bill before Parliament to make a statement to the effect that in his or her view the proposed legislation is compatible with Convention rights. Where ministers are unable to make such a statement, they are required to state that the Government nevertheless wishes to proceed with the Bill.

6.55 During the passage of the Bill, the then Lord Chancellor Lord Irvine envisaged that section 19 would have "a significant impact on the scrutiny of draft legislation within Government" because "Parliamentary scrutiny of the Bill would be intense"[185] where a minister was unable to provide a statement of compatibility. He continued "…if there had been no such provision in the Bill that might have given a quieter life for Ministers."[186]

6.56 The UK Parliamentary Joint Committee on Human Rights has responsibility for scrutinising Ministers' compatibility statements under section 19 of the Human Rights Act as well as scrutinising the remedial action proposed where the courts have made declarations of incompatibility.

The Devolution Settlements

Introduction

6.57 The power to make new laws and carry out certain government functions in the UK is exercised not only by the UK Parliament and Government but also by legislatures and administrations in Northern Ireland, Scotland and Wales. These powers were devolved in part to each of those countries by legislation passed by the UK Parliament: the Northern Ireland Act 1998, the Scotland Act 1998 and the Government of Wales Acts 1998 and 2006, as amended (known as devolution settlements).

6.58 These statutes are supplemented by the Memorandum of Understanding and Concordats[187] between the United Kingdom Government and the devolved

[184]S. 6(1). S. 6(2) provides an exception to this where the court is prevented from acting compatibly with Convention rights either by primary legislation or by provisions made under primary legislation which cannot be read compatibly with the Convention.
[185]Lord Chancellor, *House of Lords Official Report*, 3 Nov 1997, vol. 582, col. 1227-312
[186]Lord Chancellor, *House of Lords Official Report*, 27 Nov 1997, vol. 583, col. 1163.
[187]Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee, September 2012.

administrations which set out principles that underlie relations between the parties but which are not legally binding.

Background to the devolution settlements

6.59 The devolution settlements in respect of Northern Ireland, Scotland and Wales are unique in that each is tailored to reflect the particular circumstances of each country: the range of devolved policy areas differs as do the circumstances that led to each settlement. In respect of Scotland and Wales referenda were held in September 1997 and a majority voted in favour of devolution for those countries. A further referendum in Wales in March 2011 led to the National Assembly for Wales acquiring powers to pass primary legislation. In Northern Ireland, devolution was a key part of the Belfast/Good Friday Agreement, which was supported by voters in a referendum in May 1998. The Belfast/Good Friday Agreement, signed on 10 April 1998, was the product of bilateral negotiations between the UK Government and the Irish Government and of multilateral negotiations amongst political parties in Northern Ireland.

Institutions and their powers

6.60 The devolution settlements provide for devolved institutions in Northern Ireland, Scotland and Wales. In Northern Ireland, the devolved legislature is the Northern Ireland Assembly and the body that exercises certain executive functions is commonly known as the Northern Ireland Executive (comprising Northern Ireland Ministers and Departments). In Scotland, the equivalent devolved institutions are the Scottish Parliament and the Scottish Government and its Ministers. In Wales, the devolved legislature is the National Assembly for Wales and executive functions are carried out by the Welsh Ministers.

6.61 The devolution settlements provide for the exercise of certain legislative and executive powers by these devolved institutions. The devolution settlement pertaining to Scotland gives the Scottish Parliament and the Scottish Ministers powers to deal with all policy matters which have not been specifically reserved to the UK Parliament through their inclusion on a list in one of the schedules to the Scotland Act 1998. Reserved matters under the Scotland Act 1998 include defence, international relations, immigration and nationality and social security. By contrast the devolution settlement pertaining to Wales under the Government of Wales Act 2006 sets out 20 policy areas in respect of which the National Assembly for Wales can pass primary legislation encompassing most aspects of life within Wales. These areas include transport, education, health, local government and rural development. The devolution settlement pertaining to Northern Ireland consists of three categories of policy areas: ‘excepted matters’ such as the Crown and immigration and asylum in respect of which only the UK Parliament can legislate; ‘reserved matters’ such as civil aviation, the foreshore and sea bed, telecommunications and data protection in respect of which

the Northern Ireland Assembly can legislate but only with the consent of the Secretary of State; and lastly 'transferred matters' such as policing and justice, education and health in respect of which the Northern Ireland Assembly has legislative competence.

6.62 Even where powers have been devolved to Northern Ireland, Scotland or Wales, the Westminster Parliament still retains the legal authority to legislate on all matters. However, by virtue of a constitutional convention – the 'Sewel Convention' – the UK Parliament does not in practice seek to legislate in devolved areas without the consent of the devolved legislature.[188]

The devolution settlements and human rights

6.63 The devolution settlements provide that each of the devolved legislatures – the Northern Ireland Assembly, the Scottish Parliament and the National Assembly for Wales – may only enact legislation if the legislation is within its competence. It will only be within competence if, amongst other things, it is compatible with the Convention rights.[189] The devolution settlements also provide that the bodies with executive functions in these countries – the Northern Ireland Ministers and Departments, the Scottish Government and the Welsh Ministers – must act compatibly with the Convention rights. The Convention rights are defined in each of the devolution settlements as having "the same meaning as in the Human Rights Act 1998."[190] As discussed earlier in this chapter, under the Human Rights Act 1998, the 'Convention rights' means the Articles of the European Convention on Human Rights listed in Schedule 1 to the Human Rights Act 1998 and any designated derogation or reservation in force in respect of the UK.

6.64 The substantive rights protected under the Human Rights Act 1998 and each of the devolution settlements are therefore the same. Put another way, the cross-reference to the Human Rights Act 1998 in each devolution settlement means that the Convention rights as defined by the Human Rights Act 1998 are embedded in the existing devolution settlements for Northern Ireland, Scotland and Wales.

6.65 The practical effect of this limitation is that if one of the devolved legislatures were to pass any legislation (or if one of the devolved executives were to do any act including the making of subordinate legislation) that breached the rights set out in the Human Rights Act 1998, that act would be beyond the powers of the respective devolved

[188]Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee, September 2012, para. 14 of the Memorandum of Understanding.

[189]Legislation passed by the devolved legislatures will also be beyond their competence if it is contrary to EU law, deals with or relates to certain matters that fall to the UK Government/Parliament; or modifies certain pieces of existing legislation. In the case of Northern Ireland, a provision will also be beyond the competence of the Northern Ireland Assembly if it "discriminates against any person or class of person on the ground of religious belief or political opinion."

[190]Northern Ireland Act 1998, s. 98(1); Scotland Act 1998, s. 126(1); Government of Wales Act 2006, s. 158(1).

institution and it would be of no force or effect. Indeed, in a number of recent cases, legislative provisions passed by the Scottish Parliament were declared of no force or effect by the Scottish courts on the grounds they were incompatible with Convention rights.[191]

6.66 There are a number of procedural mechanisms set out in each of the devolution settlements which seek to ensure that legislation passed by the devolved legislatures is compatible with the Convention rights or is otherwise within legislative competence. These include a requirement akin to section 19 of the Human Rights Act for the Minister or other person in charge of a Bill, on or before its introduction to the legislature, to make a statement to the effect that in his or her view the Bill would be within legislative competence. They also include powers for the Law Officers to refer a Bill within four weeks of it having been passed to the UK Supreme Court to determine whether its provisions are within legislative competence.[192]

6.67 The devolution settlements also provide mechanisms by which questions on competence (including compatibility with Convention rights) may be resolved if raised in ordinary civil or criminal proceedings. Indeed an individual who wishes to challenge the compatibility with Convention rights of an act of one of the devolved institutions, has the option of challenging the alleged incompatibility under either the Human Rights Act 1998 or as a 'devolution issue' in the context of civil or criminal proceedings.

6.68 When a 'devolution issue' (concerning the extent to which a legislative provision is within the competence of the devolved institutions) arises in the context of civil or criminal proceedings, a court has the power to rule that the relevant provision is "not law" on the basis that the relevant limits on competence have been exceeded. In such circumstances, the provision of the Act or subordinate legislation in question does not have any legal force, subject to an order limiting the retrospective effect of the court's decision.[193]

6.69 This consequence of the Northern Ireland Assembly, Scottish Parliament or National Assembly for Wales legislating incompatibly with the Convention rights can be contrasted with the consequence of the UK Parliament legislating incompatibly with the Convention rights. In the latter context the court can at present only issue a declaration of incompatibility under section 4 of the Human Rights Act 1998.

[191] *Cameron v. Procurator Fiscal* [2012] ScotHC HCJAC 19; *Salvesen v. Riddell and Lord Advocate* [2012] CSIH 26.

[192] The devolution settlement pertaining to Northern Ireland contains a method to which there are not analogous provisions in respect of Scotland and Wales. The Presiding Officer of the Northern Ireland Assembly must send a copy of each Bill, as soon as reasonably practicable after its introduction, to the Northern Ireland Human Rights Commission (NIHRC), enabling the Assembly to ask the NIHRC to advise whether the proposed Bill is compatible with human rights (including the rights contained in the European Convention on Human Rights).

[193] For example in *Cameron v. Procurator Fiscal* [2012] ScotHC HCJAC 31 the power in section 102 of the Scotland Act 1998 (now amended) was used.

Who has competence over human rights?

6.70 It is not altogether clear whether 'human rights' are devolved to Northern Ireland, Scotland and Wales or reserved to the UK Parliament under the devolution settlements. There is an ongoing debate about whether conceptually human rights are a subject matter or whether they should be viewed as international obligations and in part linked to the particular policy area in question such as justice, education, or immigration.

6.71 If human rights are a subject matter in their own right they are not expressly listed as a transferred matter falling within the competence of the Northern Ireland Assembly, nor as a defined field in respect of which the National Assembly for Wales has legislative competence. In contrast, human rights are not listed among the matters reserved to the UK Parliament in the Scotland Act and could therefore be said to be devolved.

6.72 It seems clear that the devolved institutions have no power to derogate from the international obligations of the United Kingdom and cannot therefore diminish the protection afforded by the European Convention on Human Rights. On the other hand, they can, within the limits of their legislative competence, extend that protection.[194] Thus, the Scottish Human Rights Commission was created following the enactment by the Scottish Parliament of the Scottish Commission for Human Rights Act 2006. In addition the Rights of Children and Young Persons (Wales) Measure passed by the National Assembly for Wales in 2011 placed certain duties on Welsh Ministers in respect of rights under the United Nations Convention on the Rights of the Child.

6.73 The debate over which constitutional level of government has competence over human rights has important implications for any proposal to repeal and/or replace the Human Rights Act 1998 with a UK Bill of Rights. This issue is discussed in an individual paper by Anthony Speaight in this report.

[194]Observing and implementing international obligations, obligations under the European Convention on Human Rights and obligations under EU law are matters for the devolved administrations in Northern Ireland, Scotland and Wales (para. 3(c) of Sch. 2 to the Northern Ireland Act 1998; para. 7 of Sch. 5 to the Scotland Act; and ss. 80-82 and ss. 106-108 of the Government of Wales Act 2006). See also the *Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee*, September 2012, para. 21 of the Memorandum of Understanding and paras. 4.8-4.11 of the Common Annex to D4: Concordat on International Relations.

Other Statute Law

Introduction

6.74 As noted above, the Human Rights Act 1998 did not create new rights, but incorporated rights in the European Convention on Human Rights into domestic law.

6.75 However, as also discussed above, ordinary legislation by the UK Parliament and other legislatures has been another important source of rights protection in the UK. Since 1998, and the passage of the Human Rights Act, there have been numerous statutes that have further defined the scope of fundamental rights protection in the UK. What follows does not pretend to be an exhaustive survey, but highlights some of the major developments in statute since 1998.

Equality rights

6.76 The Equality Acts of 2006 and 2010, taken together, expanded and consolidated anti-discrimination protections that had existed in statute to at least some extent since the 1970s. These Acts extend to England and Wales and all but a small number of provisions extend to Scotland.

6.77 While the European Convention on Human Rights and the Human Rights Act provide that individuals in the UK should not be subject to discrimination in the application of other Convention rights, the Equality Acts provide directly that individuals should not be subject to discrimination in the provision, for example, of services or goods or in the context of employment decisions.

6.78 The 2006 and 2010 Acts specifically protect individuals from discrimination, harassment or victimisation in respect of: age; disability; gender; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion and belief; and sexual orientation.

6.79 The 2006 Act also established the Equality and Human Rights Commission, made new provision over discrimination on the grounds of religion or belief, and equipped the Commission with powers to assess public authorities' compliance with various duties in relation to sex, race and disability discrimination. It also created a duty on the public sector to promote equality on the ground of gender and imposed a duty on the Commission to promote understanding of, and good practice in relation to, human rights. The 2010 Act consolidated existing provisions of previous equality and anti-discrimination legislation, in line with the four EU Equal Treatment Directives.

6.80 Only a handful of provisions in the Equality Acts extend to Northern Ireland. Anti-discrimination issues are devolved in relation to Northern Ireland, which has long had its own body of equality legislation. Equality rights in Northern Ireland are found in a

number of pieces of legislation, including the Employment Equality (Age) Regulations (Northern Ireland) 2006, which prohibits discrimination on age in the context of employment and vocational training; and the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004, which extended the prohibition of discrimination on the ground of disability in the context of employment. Further, the Northern Ireland Act 1998, in addition to establishing the Equality Commission for Northern Ireland, places a duty on public bodies to promote equality on the grounds of certain protected characteristics. There has recently been consideration of a 'single Equality Act' for Northern Ireland (similar to the Equality Act 2010).

Information rights

6.81 In addition to its statutory protections against discrimination, the UK has legislation in place provide a right of access by an individual to their personal data and minimum standards for data processing by a third party. The Data Protection Act 1998 extends to England and Wales, to Scotland and to Northern Ireland. It superseded the earlier Data Protection Act 1984 and implemented the 1995 EC Data Protection Directive. A key feature of the Act is that it establishes eight data protection principles to be applied in data processing. The provisions of the 1998 Act are monitored and enforced by the Information Commissioner and the courts.

6.82 In some respects a complementary piece of legislation, the Freedom of Information Act 2000, came into force in 2005. The 2000 Act extends to England and Wales and Northern Ireland and establishes a right of access to information held by public authorities listed in the Act. Under the Freedom of Information Act, on receipt of a written freedom of information request, a listed public body must confirm whether or not it holds the information requested and, if it does, it must, subject to exceptions, communicate that information to the requestor (subject to the applicability of disclosure exemptions outlined in the Act). The 2000 Act is also regulated by the Office of the Information Commissioner and the courts. The equivalent legislation in Scotland is the Freedom of Information (Scotland) Act 2002. It was passed by the Scottish Parliament and establishes a right of access to information held by public authorities carrying out functions over which it has competence. The 2002 Act is enforced by the Scottish Information Commissioner and the Scottish courts.

Rights in criminal and civil justice

6.83 There are numerous other statutes that form part of the human rights landscape in the UK.

6.84 The Protection of Freedoms Act 2012 was enacted following a commitment in the Coalition agreement to "restore the rights of individuals… in keeping with Britain's tradition of freedom and fairness." Its provisions extend mainly to England and Wales but some provisions apply also to Scotland and to Northern Ireland. The Act places

limitations on the authority of the police and other bodies in England and Wales to retain individuals' fingerprint and DNA data, thereby buttressing their privacy protections;[195] and limitations on police stop and search powers in counter-terrorism operations across the UK thereby strengthening individuals' rights against arbitrary detention.[196]

6.85 The Terrorism Prevention and Investigation Measures Act was enacted in 2011 following another commitment in the Coalition Agreement to urgently review control orders – preventative measures enabling authorities to impose constraints on those suspected of involvement in terrorism-related activity. It extends to England and Wales, Scotland and Northern Ireland. The 2011 Act replaced control orders with a new model, Terrorism Prevention and Investigation Measures (TPIMs), in response to civil liberties concerns. The new model includes, inter alia, a limit of two years for the duration of a TPIM and provides for less restrictive powers relating to curfew, police search and the monitoring of communications.

Children's rights

6.86 Children's rights are protected under a number of pieces of legislation that extend to different parts of the UK. This legislation includes the following:

6.87 The Children Act 2004, together with the Children Act 1989, which it amended only in part, set out a number of protections and rights for children in England and Wales, including provisions for the coordination between different state actors to improve the well-being of children and young people. The Children (Northern Ireland) Order 1995 and the Children (Scotland) Act 1995 contain similar provisions in respect of children in Northern Ireland and Scotland respectively.

6.88 The Children Act 2004 also established the Children's Commissioner for England with the general function of promoting awareness of the views and interests of children in England. The Commissioner also has functions over children in other parts of the UK in respect of reserved matters.

6.89 As regards Wales, the Children's Commissioner for Wales was established in two stages under the Care Standards Act 2000 and the Children's Commissioner for Wales Act 2001 (both Acts of the UK Parliament). The Children's Commissioner has the principal aim of safeguarding and promoting the rights and welfare of children in Wales. More recently, the National Assembly for Wales passed the Rights of Children and Young Persons (Wales) Measure 2011 that placed a duty upon Welsh Ministers to have "due regard" to the UN Convention on the Rights of the Child in the exercise

[195]These provisions are contained in Part 1 of the 2012 Act which is not yet in force. These provisions followed the decision of the European Court of Human Rights in *S & Marper v. UK*, no. 30562/04 [2008] ECHR 1581.
[196]This followed the decision of the European Court of Human Rights in *Gillan and Quinton v. UK*, no. 4158/05, [2010] 50 EHRR 45.

of their functions.

6.90 In respect of Scotland, the Scottish Parliament passed the Commissioner for Children and Young People (Scotland) Act 2003 which created Scotland's Commissioner for Children and Young People. The Commissioner has the general function of promoting and safeguarding the rights of children and young people in Scotland. More recently, between July and September 2012, the Scottish Government has consulted on a draft Children and Young People Bill which seeks to give further effect to the UN Convention on the Rights of the Child in a manner similar to that achieved in Wales, as set out above.

6.91 Children in Northern Ireland fall within the remit of the Commissioner for Children and Young People which was created by the Commissioner for Children and Young People (Northern Ireland) Order 2003. The Commissioner's principal aim is to safeguard and promote the rights and best interests of children and young persons in Northern Ireland.

6.92 Lastly, the Child Poverty Act 2010 which extends to England, Wales, Scotland and Northern Ireland seeks to ensure a suitable standard of living for children through a binding commitment on the Government to eradicate child poverty in the UK by 2020.

Rights for other minority or vulnerable groups

6.93 The Gender Recognition Act 2004[197] which, subject to minor exceptions applies UK-wide, makes provision for transsexual people to change their legal gender. This allows them to be recognised by the law of England, Wales, Scotland and Northern Ireland in the opposite gender to their birth gender.

6.94 The Civil Partnership Act 2004 gave same-sex couples across the UK the right to enter into civil partnerships that would carry the same rights and responsibilities as civil marriage.

6.95 The Forced Marriage (Civil Protection) Act 2007 protects individuals from being forced into or who have been forced into marriage against their will. The statute authorises courts in England and Wales and in Northern Ireland to make orders to protect the individual from the forced marriage. In 2011, the Scottish Parliament passed similar legislation: The Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act.

6.96 Women's rights have been protected under the Female Genital Mutilation Act 2003, which replaced the Prohibition of Female Circumcision Act 1985 by extending the previous protection from a practice that is internationally recognised as a violation of

[197] This followed the decision of the European Court of Human Rights in *Goodwin and I v.* UK, no. 28957/95, [2002] ECHR 583.

the human rights of women and girls. This Act extends to England and Wales and to Northern Ireland and has certain extra-territorial effect. The Prohibition of Female Genital Mutilation (Scotland) Act 2005 is the equivalent legislation in Scotland.

6.97 Increased protection for the rights of older people was behind the enactment of the Commissioner for Older People (Wales) Act 2006 which created the office of the Commissioner for Older People in Wales. This Act requires the officeholder to take into account the UN Principles for Older Persons when determining what constitutes the interests of older people in Wales.

Other instruments

6.98 The Coroners and Justice Act 2009 contains wide-ranging provisions that affect rights in a number of areas. Most notably the legislation enhances the protection of freedom of expression in England and Wales and Northern Ireland by abolishing the offences of sedition and seditious, defamatory and obscene libel in addition to enhancing the prohibition on slavery and forced labour by making these criminal offences. The Act also recognises the role of inquests in respecting the rights of the bereaved.

6.99 In contrast to the instruments outlined above, there are examples of legislation that some believe have resulted in less protection for the rights of individuals than had previously been the case.

6.100 In response to advances in technology and communications, the Regulation of Investigatory Powers Act was enacted in 2000 and extends to England, Wales and Northern Ireland. The purpose of this legislation was to regulate the use of and access to surveillance by public bodies. Many have argued, however, that this legislation, together with the Regulation of Investigatory Powers (Scotland) Act 2000, has contributed to the erosion of privacy rights in the UK by including provisions that give a wide range of public bodies powers in respect of conducting surveillance and intercepting communications.

6.101 The perceived threat from terrorism in the UK has led to the enactment of legislation, which limits fundamental rights in a number of ways. The Prevention of Terrorism Act 2005 introduced control orders allowing the Secretary of State, or the court on an application of the Secretary of State, to impose extensive restrictions on the liberty of individuals for purposes connected with protecting members of the public from terrorism. The Act has since been repealed and replaced by the Terrorism Prevention and Investigation Measures Act 2011, which abolished control orders and replaced them with alternative mechanisms.

6.102 The Terrorism Act 2006 created the broadly-framed offence of direct or indirect encouragement of terrorism. Due to the loose definition of terrorism; the fact that this offence carries a maximum sentence of seven years imprisonment; and that it can be committed merely with reckless intent, many critics have seen this as an unacceptable

curtailment of freedom of expression. Additionally, this Act amended the Terrorism Act 2000 to increase the period that a terror suspect can be held without charge from 14 days to 28 days.

Institutions and Organisations

Introduction

6.103 Alongside the development of the common law and the legislative framework for the protection of human rights, there are also various bodies, institutions and organisations which monitor or promote the implementation of human rights legislation and help to shape the debate about human rights protection.

6.104 Many of these have statutory roles or duties or, in the case of the Joint Committee on Human Rights, arise from the UK Parliament's rules and procedures. There is also a broad spectrum of non-governmental, charity and voluntary communities that contribute to the discussion and protection of human rights in the UK.

The Joint Committee on Human Rights

6.105 The Joint Committee on Human Rights is a Joint Select Committee appointed by the House of Commons and House of Lords. It plays a key role in the UK Parliament in relation to the protection of human rights. The Joint Committee is often highlighted as an example of good practice in respect of Parliamentary protection of human rights – for example by the Parliamentary Assembly of the Council of Europe.[198]

Overview of the role of the Joint Committee

6.106 The Joint Committee has a maximum of six members appointed by each House whose membership extends until the end of each Parliament. It is a cross-party Committee which is not controlled by the governing party.

6.107 The Joint Committee's functions are set down in the Standing Orders of the House of Commons and in the Joint Committee's terms of reference.[199] It has a general mandate to consider "matters relating to human rights in the United Kingdom (excluding consideration of individual cases)." In addition, the Joint Committee:

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[198] See *National Parliaments: guarantors of human rights in Europe*, Parliamentary Assembly of the Council of Europe, Document 12636, 6 June 2011, paras. 61-65.

[199] The remit of the Joint Committee on Human Rights is "to consider:
(a) matters relating to human rights in the United Kingdom (but excluding consideration of individual cases);
(b) proposals for remedial orders, draft remedial orders and remedial orders made under the Human Rights Act 1998; and
(c) in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in House of Commons Standing Order No. 151 (Statutory Instruments (Joint Committee))."

a) scrutinises and reports on all Government Bills (and some Private Members' Bills) which raise "significant human rights issues" in relation to their human rights implications and compatibility.[200] As part of this process Government departments may provide human rights memoranda to the Joint Committee which set out the Government's justification as to why the Bill is compatible with Convention rights. The Joint Committee's subsequent reports may recommend amendments to the relevant Bill to give effect to the Committee's recommendations;

b) scrutinises the Government's response to adverse human rights judgments from both the UK courts (where declarations of incompatibility have been made) and the Strasbourg Court;

c) reports to Parliament on human rights treaties before they are ratified by the UK and scrutinises the implementation in the UK of provisions of international human rights treaties;

d) conducts inquiries into specific human rights issues. These inquiries can be thematic inquiries, linked to the Joint Committee's scrutiny work and inquiries into major unexpected developments or significant human rights issues of national concern, such as its 2008 report on a Bill of Rights for the UK;[201]

e) monitors the implementation of the Human Rights Act 1998; and

f) considers proposals for remedial orders.

6.108 The Joint Committee also has the power to require the submission of written evidence and documents, to examine witnesses, to appoint expert advisors and to make reports to both Houses of Parliament.

6.109 The Joint Committee therefore has a role in respect of human rights issues that are dealt with by the UK Parliament. In addition, each of the devolved legislatures of Scotland, Wales and Northern Ireland has a committee that, among other roles, monitors human rights issues within devolved competence: the Justice Committee of the Northern Ireland Assembly; the Justice Committee of the Scottish Parliament; and the Constitutional and Legislative Affairs Committee of the National Assembly for Wales.

[200] These obligations relate not only to the European Convention on Human Rights, but to all the UK's international human rights obligations (such as UN Conventions).

[201] Joint Committee on Human Rights, *A Bill of Rights for the UK*, Twenty-ninth Report of Session 2007-8, HL Paper 165-I, HC 150-I, 10 August 2008.

National Human Rights Institutions

6.110 In each of England and Wales, Scotland and Northern Ireland, there is a statutory body that monitors, protects and promotes human rights in that country. In particular, the body monitors public authorities' compliance with relevant legislation and has an educative role in respect of the public. These bodies are, respectively, the Equality and Human Rights Commission, the Scottish Human Rights Commission and the Northern Ireland Human Rights Commission.

6.111 These bodies have all been accredited, within a framework governed by the United Nations, as National Human Rights Institutions (NHRIs). This accords them an enhanced status in the domestic and international framework of rights protection, as well as access to assistance from UN bodies.[202]

The Equality and Human Rights Commission

6.112 In May 2004 the UK Government published a White Paper entitled *Fairness for All: A New Commission for Equality and Human Rights*.[203] This paper set out proposals for a 'Commission on Equality and Human Rights' which would combine the functions of the three anti-discrimination commissions and which would take on additional responsibilities relating to equality and human rights law.[204]

6.113 In 2006, the Equality and Human Rights Commission was established by statute, with a number of functions, including promoting and protecting human rights, monitoring the law and advising the Government about the effectiveness of equality and human rights enactments and the likely effect of a proposed change of law; encouraging public authorities to comply with section 6 of the Human Rights Act; promoting the understanding of the importance of human rights and good practice in relation to them; conducting investigations and applying for injunctions to prevent breaches of equality and human rights law; and providing legal assistance or bringing/intervening in judicial review proceedings.

6.114 The Equality and Human Rights Commission has a human rights remit in England and

[202]The NHRI framework was developed under the auspices of the Office of the United Nations High Commissioner for Human Rights. Accreditation as an NHRI is usually not assessed by a UN body, but by peer review – through the sub-committee of International Coordinating Committee of National Human Rights Institutions (ICC).The ICC, through its Sub-Committee on Accreditation, has granted all three UK NHRIs 'A-status', enabling these bodies to have enhanced access to the Human Rights Council, treaty bodies and other United Nations human rights bodies.

[203]Cm 6185, May 2004.

[204]Equality law generally prohibits the denial of jobs or services or other opportunities on the basis of prohibited grounds of discrimination such as gender, disability, race, ethnicity etc., whereas human rights legislation is generally broader, ensuring the protection of a broader spectrum of civil, political and democratic rights and freedoms, such as the right to life, the right to a fair trial and freedom of expression. Human rights instruments often include a right against discrimination, but it is generally narrower than equalities legislation, in particular in the case of the Human Rights Act 1998, in which the right is strictly against discrimination in the application of the other Convention rights in the Act.

Wales, and in Scotland in respect of matters that are reserved to the UK Parliament and Government, such as immigration. It also deals with equalities issues in England, Wales, and Scotland.[205]

6.115 When dealing with all human rights and equalities issues that affect Wales and reserved issues affecting Scotland, the Commission handles these through its Wales and Scotland Committees. The Commission has no remit in Northern Ireland in respect of human rights or in respect of equalities issues as these are both dealt with by bodies in Northern Ireland: the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland.

Scottish Human Rights Commission

6.116 When the UK Government proposed the Equality and Human Rights Commission for England and Wales and in certain respects Scotland, the then Scottish Executive had already made clear its intention to create a separate human rights body for Scotland. There was mention in the legislation establishing both commissions of the need for cooperation between the two institutions.

6.117 The Scottish Human Rights Commission was established by the Scottish Parliament in the Scottish Commission for Human Rights Act 2006. The main elements of the Commission's remit are to promote human rights and, in particular, to encourage best practice in relation to human rights. In particular, it may review and recommend changes to any area of the law of Scotland, or any policies or practices of any Scottish public authorities; or intervene in civil proceedings where the issue arising is relevant to the Commission's general duty and raises a matter of public interest.

6.118 The Equality and Human Rights Commission may co-operate with the Scottish Human Rights Commission in undertaking its duties, intervening in or instituting legal proceedings, where relevant to the Commission's functions (including in Scotland). The Scottish Commission's role, on the other hand, is limited to devolved issues. A Memorandum of Understanding between the Equality and Human Rights Commission and the Scottish Human Right's Commission is in place concerning work in Scotland.

Northern Ireland Human Rights Commission

6.119 The Northern Ireland Human Rights Commission was created by the Northern Ireland Act 1998, in accordance with a commitment made by the UK Government in the Belfast/Good Friday Agreement of 10 April 1998.

6.120 The functions of the Commission include promoting understanding and awareness of the importance of human rights in Northern Ireland. In particular, it must keep under

[205] Equality law has not been devolved to the Scottish Parliament.

review the adequacy and effectiveness of law and practice relating to the protection of human rights; advise the Secretary of State and the Northern Ireland Executive of legislative and other measures which ought to be taken to protect human rights;[206] and advise the Assembly whether a proposed bill is compatible with human rights (not just limited to Convention rights).

6.121 The 1998 Act also established the Equality Commission for Northern Ireland, following commitments in the Belfast/Good Friday Agreement. The Equality Commission for Northern Ireland assumed the functions of four existing anti-discrimination bodies in Northern Ireland. The Commission is charged with monitoring the effectiveness of the duty on public authorities set out in the 1998 Act to promote equality of opportunity and good relations.

Other statutory bodies

6.122 There are a number of other statutory bodies and officeholders in the UK that play an important role in monitoring, protecting or promoting human rights.

6.123 In some cases the duties incumbent on such bodies are based expressly on human rights instruments. For example, the various pieces of legislation that created the Children's Commissioner in each of England, Scotland, Wales and Northern Ireland state that the officeholder must have regard to the UN Convention on the Rights of the Child in carrying out their duties promoting the views and interests of children and young people.

6.124 In other cases, the statutory and other bodies simply play roles which may implicitly or, at times, include consideration of issues relating to human rights. For example:

a) the Parliamentary and Health Service Ombudsman considers complaints that government departments and agencies in the UK (and the NHS in England) have not acted properly, fairly or have provided a poor service. This role can often engage issues in respect of the right to a fair hearing under Article 6 of the Convention. The Scottish Public Services Ombudsman performs a similar role in respect of Scotland;

b) the Independent Reviewer of Terrorism Legislation considers, amongst other things, the impact of anti-terrorism legislation on human rights. This can include considerations in respect of the right to life under Article 2, the prohibition on torture and inhuman and

[206]The Northern Ireland Human Rights Commission was mandated by the Belfast/Good Friday Agreement to advise the Secretary of State for Northern Ireland on a Bill of Rights for Northern Ireland. The Commission published its advice in 2008.

degrading treatment under Article 3, the right to liberty and security under Article 5 and the right to a fair trial under Article 6; and

c) the Information Commissioner has a number of functions relating to the protection of individuals' personal data held by public authorities and private companies, and relating to the public right of access to information held by public authorities. The Commissioner's work therefore involves considerations in respect of privacy rights under Article 8 of the Convention and the right to freedom of expression under Article 10 of the Convention. The Scottish Information Commissioner has a similar role in relation to the freedom of information regime in Scotland.

Non-governmental, charity and voluntary organisations

6.125 There is a particularly active community of non-governmental organisations (NGOs) that monitor or promote human rights in the UK. Notably, some human rights NGOs in the UK were created as a result of movements to establish a UK Bill of Rights and/or incorporate the European Convention on Human Rights into domestic law.

6.126 The role of NGOs in relation to human rights often includes one or more of the following: monitoring human rights developments; advocating changes in law, practice or policy; assisting with litigation; and promoting understanding and awareness of human rights.

6.127 NGOs have been designated a specific role by the Council of Europe in relation to the implementation of the Convention at the national level and in the implementation of judgments of the European Court of Human Rights. They represent 'civil society' in both the Committee of Ministers and the Parliamentary Assembly of the Council of Europe.

6.128 As members of the Commission have seen and heard at first-hand, through its programme of consultation, there is also a particularly active community of charity and voluntary organisations which work to promote or protect the human rights of numerous individuals, groups and communities in the UK, often at a more community or local level than NGOs.

Chapter 7: Arguments for and against a UK Bill of Rights

Arguments for and against: from 1998 to 2010

7.1 In considering the arguments for and against a UK Bill of Rights, it is useful to survey briefly the factors that have been raised in the past.

1960 to 1998

7.2 Proposals in the modern UK for a new Bill of Rights first appeared in the late 1960s. Ideas in a trickle of pamphlets largely produced by lawyers[207] started to be picked up by MPs and peers. In 1969, there was a full debate on the idea in the House of Lords initiated by Lord Wade, and several Members of Parliament introduced 10-minute rule bills.[208] The notion of a new Bill of Rights was given added authority in 1974 when Lord Scarman chose to deliver the Hamlyn lecture on the subject.[209] Over the next two decades the idea for a new Bill of Rights regularly surfaced in various papers suggesting constitutional reform. For example, a Home Office Discussion Document, *Legislation on Human Rights: With Particular Reference to the European Convention* was drawn up by an interdepartmental Working Party of senior civil servants and subsequently published in June 1976.[210]

7.3 The proponents of a Bill of Rights in these years were drawn from many parts of the political spectrum. Those who introduced bills in the House of Commons included members of the Liberal Party like Alan Beith MP, of the Labour Party like Graham Allen MP, the Ulster Unionist James Kilfedder MP and Conservatives like Sir Edward Gardner QC MP.

7.4 The interests and concerns that prompted these proposals were also varied. Lord Scarman was influenced by the use of interrogation techniques in Northern Ireland, as well as provisions of the Immigration Act 1971. By contrast, for Sir Keith Joseph MP, who was another early advocate of a Bill of Rights, the worries were of a different

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[207] Lester, "Democracy and Individual Rights", Fabian Tract No. 390, November 1968; Macdonald, "A Bill of Rights" (1969).

[208] Lord Lambton MP on 23 April 1969; Lord Wade's motion in House of Lords on 18 June 1969; Emlyn Hooson QC, MP on 22 July 1969; Lord Arran 26 November 1970; Sam Silkin QC MP 2 April 1971.

[209] Sir Leslie Scarman (then a Lord Justice of Appeal), "English Law - The New Dimension", in *The Hamlyn Lectures Twenty-Sixth Series* (London: Stevens & Sons, 1974).

[210] It was published as *Report of an Interdepartmental Working Group Concerning Legislation on Human Rights, with Particular Reference to the European Convention, 1976-77,* HL 81. A further example was the Standing Advisory Commission on Human Rights, *The protection of human rights by law in Northern Ireland*, 1977, Cmnd. 7009.

nature, namely unreasonably high taxation, the power of unions and shop stewards, and the erosion of property rights by means of compulsory purchase.[211]

7.5 Notwithstanding these differences in motivation, there was a strong common theme in the arguments being advanced for a Bill of Rights between the late 1960s and the early 1990s. All were concerned that the executive and public officials were subject to insufficient scrutiny, and that a House of Commons might pass legislation after inadequate consideration and without adequate regard for fundamental freedoms – this latter concern usually being expressed with greater force and frequency by individuals associated with parties in opposition than of parties in government. All, too, saw an enhanced role for judges, although there was a range of ideas as to the exact mechanism by which rights would be protected.

7.6 Lord Scarman suggested entrenching a Bill of Rights so as to provide a constitutional restraint on Parliament acting incompatibly with any Bill. Sir Keith Joseph suggested that an enhanced majority in Parliament should be required for major changes that ran counter to fundamental rights. In 1976 a Labour Party sub-committee chaired by Shirley Williams MP proposed a Charter of Human Rights to state principles, although Parliament was to be free to legislate in any manner it wished.[212]

7.7 As to the text of rights, some suggested simply adopting the European Convention on Human Rights. That was the proposal, for example, of Shirley Williams' Labour Party Committee. In 1984, no fewer than 107 Conservative backbenchers signed an early day motion to the same effect. A few years earlier, in 1978, Leon Brittan MP, on behalf of the Conservative Opposition, moved an amendment to the then Labour Government's plans for Scottish devolution proposing a Bill of Rights for Scotland based on the European Convention on Human Rights. That same year, all the members of a House of Lords Select Committee agreed that if there were to be a Bill of Rights it should be based on the European Convention on Human Rights, but were unable to agree whether such a Bill would be desirable.[213]

7.8 Other proposals favoured the inclusion of additional rights beyond those set forth in the European Convention on Human Rights. For example, in 1991 the Institute for Public Policy Research published a draft Bill of Rights which contained elements drawn from the International Covenant on Civil and Political Rights as well as from the European Convention on Human Rights, plus an explicit right for aliens not to be returned if their life or liberty were in danger for discriminatory reasons.[214] That same year, Liberty published "A People's Charter" that included numerous additional rights,

[211]Sir Keith Joseph MP, "Freedom under the Law", Speech at a Conservative Political Centre conference, 26 January 1975 (published as a pamphlet).
[212]Report of Human Rights Sub-Committee of Home Policy Committee of the National Executive of the Labour Party, 1976.
[213]House of Lords, Report of the Select Committee on a Bill of Rights, paper 176, June 1978.
[214]Lester et al., *A British Bill of Rights* (Institute for Public Policy Research, 1991).

such as a right to trial by jury, a right not to have to carry an identification card, a right of access to official information, a right to strike, equal rights for children born out of wedlock, and many others. In 1988, one of the objectives of the "Charter 88" movement was a Bill of Rights enshrining various civil liberties, including jury trial.

7.9 During this period the arguments against any form of Bill of Rights were largely focused on three considerations: that the decisions which a Bill of Rights would transfer to judges were essentially political in character; that a Bill of Rights would be undemocratic; and that a Bill of Rights would politicise the judiciary. Any form of entrenchment was regarded as incompatible with the theory of Parliamentary sovereignty, with lofty declarations of general principle being considered to be somewhat 'un-British'.

7.10 Ironically, in view of the way in which the debate has developed today, one of the arguments against a Bill of Rights in this period was that the judges would perform their role in too timid and conservative a manner. A paper by the Cobden Trust noted that "in the eyes particularly of the left," judges "if not actually biased towards the Tories... are at least imbued with the social values of the middle classes, and suspicious of progressive ideas."[215] Liberty said that many who would otherwise support a Bill of Rights opposed it solely because of the judges' past record.

7.11 In the mid-1990s it became official policy of the Labour Party to incorporate the European Convention on Human Rights, and shortly after forming a government this was duly done by the Human Rights Act (see below).

Arguments for and against: from 1998 to 2010

7.12 There was a lull in talk of a Bill of Rights in the period immediately following the passage of the Human Rights Act. But after a few years proposals for a British Bill of Rights began to re-appear, not only from those who were critics of the Human Rights Act, and from a range of different political perspectives.

7.13 In June 2006, David Cameron MP, who had recently been elected Leader of the Conservative Party, advocated replacing the Human Rights Act with "a modern British Bill of Rights to define the core values which give us our identity as a free nation," whilst remaining a party to the European Convention on Human Rights. The Liberal Democrat Party reiterated its long-standing support for a written constitution which would incorporate a Bill of Rights.[216] In July 2007 the Labour Government published a Green Paper *The Governance of Britain*[217] which proposed developing a British

[215]Wallington and McBride, *Civil Liberties and a Bill of Rights* (London: Cobden Trust, 1976), p. 27.
[216]See e.g. "For the People, By the People" Liberal Democrat Policy Paper 83, August 2007.
[217]Green Paper, *Governance of Britain* (Cm 7170), July 2007.

Statement of Values and a British Bill of Rights and Duties. It said that the Human Rights Act had been an important first step, but no more than that:

> "...the Human Rights Act...was intended to be a first, but substantial step towards a formal statement of rights, articulating the relationship between individuals and between the state and the citizen...
>
> But the Human Rights Act should not necessarily be regarded as the last word on the subject. During the Parliamentary debates in 1997 and 1998 incorporating the Convention was described as the first step in a journey."

7.14 There were two main arguments in the Green Paper for a British Bill. One was that this could "provide explicit recognition that human rights come with responsibilities." The other was that a fuller articulation of values held in the United Kingdom would promote a stronger commitment to fundamental freedoms.

7.15 In September 2007, JUSTICE published a report entitled *A British Bill of Rights: Informing the Debate*.[218] It was a valuable and balanced source for the identification of issues involved in relation to a possible Bill of Rights, as well as a helpful distillation of comparative experience from different jurisdictions. JUSTICE presented no firm conclusion, reflecting "some reservations" about a project for a Bill of Rights "stemming from a concern to ensure that a new constitutional document does not present any opportunity to afford less, rather than more, protection for fundamental rights in Britain." Nevertheless, the report was "sympathetic" to a number of supporting arguments for a British Bill of Rights, which could have a positive effect. Amongst the arguments to which the JUSTICE report was sympathetic were that a Bill of Rights could play an educative role, update the European Convention on Human Rights, reaffirm our national identity, recognise the international responsibilities of the United Kingdom, and broaden the debate on rights by focusing on a wider concept of values including the need for responsibility.

7.16 In August 2008, the Joint Committee on Human Rights published a report *A Bill of Rights for the UK*?. This all-party committee of both Houses of Parliament expressed the firm conclusion that the UK should adopt a Bill of Rights and Freedoms, and prepared a draft bill. Its report began:

> "1. There currently exists an unusual cross-party consensus about the need for a 'British Bill of Rights'…
>
> 2. The consensus across the political parties appears to reflect a wider consensus amongst the public…"

[218] JUSTICE, *A British Bill of Rights: Informing the Debate*, 19 November 2007.

7.17 The Committee agreed that "any UK Bill of Rights has to be 'ECHR plus'," and that "it cannot detract in any way from the rights guaranteed by the ECHR,"[219] and that it was "imperative that the HRA not be diluted in any way in the process of adopting a Bill of Rights" and that "there must be no question of weakening the existing machinery in the HRA for the protection of Convention rights."[220] The crucial arguments in the view of the Committee were these:

> "our work over the last few years has demonstrated that there are many groups in society, such as older people and adults with learning difficulties, whose human rights are insufficiently protected. We argue that a UK Bill of Rights and Freedoms is desirable to provide necessary protection to all, and to marginalised and vulnerable people in particular.
>
> Adopting a Bill of Rights provides a moment when society can define itself. We recommend that a Bill of Rights and Freedoms should set out a shared vision of a desirable future society: it should be aspirational in nature as well as protecting those human rights which already exist."

7.18 The Joint Committee on Human Rights recommended the inclusion of the right to jury trial, the right to administrative justice and further international human rights, such as rights for children. The Committee favoured the inclusion of economic and social rights, including rights to health, housing and education, but on a less than fully-justiciable basis: they suggested that the Government should have a duty to progress towards realising such rights, and should regularly report thereon, but that individuals should not be able to enforce such rights through the courts. The Committee considered that rights could not be contingent on the performance of duties, but that the language of responsibilities could have a role to play, perhaps in the preamble to the Bill. The Committee envisaged that the new Bill, when it came into force, would replace the Human Rights Act, rather than sit beside it, and although it was silent on the question of incorporation of the European Convention on Human Rights, the implication is that the approach was premised on the continued incorporation of the Convention. In the Committee's view the UK's devolution arrangements did not preclude a UK-wide Bill of Rights but bills of rights at the devolved level were also desirable.[221]

7.19 In March 2009, the Labour Government published a further Green Paper, *Rights and Responsibilities: Developing our Constitutional Framework*. The title revealed the leitmotif:

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[219] Joint Committee on Human Rights, *A Bill of Rights for the UK*, Twenty-ninth Report of Session 2007-8, HL Paper 165-I, HC 150-I, 10 August 2008 para. 50.
[220] Ibid., para. 53.
[221] Ibid., para. 110.

> "... the rights in the European Convention cannot be legally contingent on the exercise of responsibilities. However, it may be that responsibilities can be given greater resonance in a way which does not necessarily link them to the adjudication of particular rights."[222]

7.20 This Green Paper identified possibilities, often in rather general terms, rather than expressing any clear preferences. One specific idea was that the court might be required to consider an individual's behaviour before deciding any award of damages (presumably for breach of the duty on public authorities to act compatibly with Convention rights), pointing out that this was already the practice of the Strasbourg Court in relation to the award of 'just satisfaction'.[223] The Green Paper also raised the possibility of bringing together in a single statute or charter social and economic rights and entitlements in other documents, such as the NHS Constitution for England (in the eyes of some, the Paper's authority was undermined by the choice of the first item on the list of suggested citizens' responsibilities, namely to treat NHS staff with respect): this distracted attention from such civic responsibilities and duties as the performance of jury service.

7.21 At the same time, arguments continued to be raised against a Bill of Rights. The Joint Committee on Human Rights reported that "not all witnesses were persuaded that a Bill of Rights was required," and that a "surprising number" of witnesses in its inquiry were opposed to a Bill of Rights solely on the ground that "the real motivation behind the proposal was to dilute the protections for human rights already contained in the HRA."[224] The Joint Committee was firmly opposed to diluting the Human Rights Act and accordingly saw little force in this argument: it was strongly supportive of the idea that the international obligation under the European Convention on Human Rights would remain, and the Joint Committee considered it "legally and empirically incorrect" to suggest that a Bill of Rights would lead the Strasbourg Court to allow the UK a greater margin of appreciation.

7.22 In the summer of 2009, the publication of details of expenses claimed by MPs gave a new impetus to discussion of constitutional reform. But it did not appear to alter the generally favourable attitude towards a Bill of Rights. In his call for a written constitution as a response to the Commons expenses affair, Richard Gordon QC published a draft Constitution containing a 34-article Bill of Rights.[225] It has many similarities to the Joint Committee's draft including additional rights for children,

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[222] Green Paper, *Rights and Responsibilities: developing our constitutional framework* (Cm 7577), March 2009, p. 8.
[223] *Eckle v. Germany* [1982] 5 EHRR 1, 15 July 1982.
[224] Joint Committee on Human Rights, *A Bill of Rights for the UK*, Twenty-ninth Report of Session 2007-8, HL Paper 165-I, HC 150-I, 10 August 2008, para. 47.
[225] Gordon, *Repairing British Politics: A Blueprint for Constitutional Change* (Oxford: Hart Publishing, 2010).

economic and social rights, and a recognition of responsibilities and duties (without making the existence of non-derogable rights contingent on good behaviour).

7.23 In May 2010, the Coalition Programme announced:

> "we will establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties."[226]

Arguments for and against today

7.24 Since it was established in May 2011, the Commission has issued two consultations and considered the responses, as well as engaged in other efforts to obtain views.[227]

7.25 In response to the Commission's first and second consultation papers, there was a range of views about a possible UK Bill of Rights.[228] In general terms, the views have been put forward that:

a) The Human Rights Act should remain unchanged and continue to operate as at present;

b) The Human Rights Act should be supplemented by a Bill of Rights for Northern Ireland;

c) The Human Rights Act should be maintained and supplemented by a purely declaratory Bill of Rights (or a purely declaratory Bill of Rights and Responsibilities);

d) The Human Rights Act should be amended to include any of:

   i) a modification of the terminology and statements of existing rights; and/or

   ii) the addition of qualifying/limiting/balancing clauses; and/or

   iii) the addition of new rights;[229] and/or

[226] HM Government, *The Coalition: our programme for government*, May 2010, p. 11.

[227] We are aware that those making responses may be a self-selecting group, and that the balance of whose views will not necessarily be seen to be reflective of those in the population at large.

[228] See volume two of this report for more detailed information on the range of reasons offered by respondents.

[229] Suggestions put to us during the consultation include inter alia equality before the law and the equal protection of the law; administrative justice; trial by jury (but not in Scotland); non-justiciable economic and social rights or directive principles (e.g. the Indian, Irish, or South African models); environmental rights; rights contained in international treaties which the UK has ratified or may ratify (e.g. the Convention on the Rights of the Child, and Protocols No. 4 or No. 7 or No. 12 to the European Convention on Human Rights).

iv) the addition of certain responsibilities; and/or

v) a modification of the courts' interpretative duties; and/or

vi) a modification of enforcement and other provisions.

e) The Human Rights Act should be repealed and not replaced by anything else.

f) The Human Rights Act should be repealed and replaced by a new UK Bill of Rights, which could:

i) restate Convention rights as currently stated in Schedule 1 of the Human Rights Act and/or adopt modified language; and/or

ii) restate Convention rights and add new rights; and/or

iii) restate Convention rights and add provisions that qualify or limit rights and/or set out a balance between rights; and/or

iv) add new provisions on enforcement and related matters; and/or

v) make provision for distinct chapters and separately enacted instruments for each of Northern Ireland, Scotland and Wales.

g) Repeal the Human Rights Act and, as part of a new constitutional settlement, enact an entrenched Bill of Rights.

7.26 The apparent clarity of categorisation does not, however, do justice to the range of positions and arguments put to the Commission, or the fullness of the arguments justifying the various options. Five main reasons have been advanced in support of, and six main reasons advanced against, a UK Bill of Rights.[230]

7.27 The reasons cited for a UK Bill of Rights included the following:

a) The Human Rights Act is inadequate.

The responses in this category included the following themes:

i) the Human Rights Act is perceived negatively (regardless of whether this perception is informed/ justified or ill-informed/ unjustified);

ii) the current system under the Human Rights Act has resulted in unpopular judicial and related decisions; and

[230]The identification, number and order is not intended to reflect the weight or authority of the views expressed.

iii) a UK Bill of Rights would be more effective than the Human Rights Act in protecting the rights of individuals.

b) A UK Bill of Rights would be more 'British' and less 'European'.

The responses in this category included the following themes:

i) a UK Bill of Rights would result in greater domestic 'ownership' of rights; rights would be less 'foreign'; and

ii) a UK Bill of Rights could contain rights which better reflect the domestic political and constitutional heritage and British legal culture.

c) A UK Bill of Rights would have an enhanced status and/or symbolic value.

The responses in this category included the following themes:

i) the UK needs a written constitution;

ii) a UK Bill of Rights would have symbolic value;

iii) a UK Bill of Rights would provide greater certainty/clarity about rights than other laws; and

iv) a UK Bill of Rights would bring social benefits (for example, it might have a unifying effect for the United Kingdom as a whole).

d) A UK Bill of Rights would allow for rights to be linked to responsibilities.

e) A UK Bill of Rights would allow additional rights to be adopted, in addition to those set forth in the Human Rights Act.

7.28 The reasons cited against a UK Bill of Rights may be broadly characterised as follows:

a) The Human Rights Act is adequate.

The responses in this category included the following themes:

i) the Human Rights Act has had a generally positive impact and has worked well;

ii) the level of protection of human rights under the Human Rights Act must be maintained;

iii) the Human Rights Act is in effect a UK Bill of Rights so no change is necessary;

iv) the Human Rights Act's enforcement mechanisms are balanced and effective and should be protected;

v) the civil rights and liberties protected by the Human Rights Act are adequate and should remain protected;

vi) the Human Rights Act and devolution legislation deal well with the relationship between the different parts of the United Kingdom, and a new Bill of Rights would unsettle the existing arrangements;

b) Historic rights instruments are adequate.

The responses in this category expressed this view:

i) a UK Bill of Rights is not needed because rights are already sufficiently protected under other historic rights instruments, including Magna Carta and the Bill of Rights 1689, and by the common law.

c) A UK Bill of Rights would lead to an increase in rights litigation.

The responses in this category included the following themes:

i) a UK Bill of Rights would promote a greater rights culture/compensation culture; and

ii) a UK Bill of Rights would lead to increased Government or other public expenditure.

d) A UK Bill of Rights would undermine existing levels of protection.

The responses in this category included the following themes:

i) a UK Bill of Rights would result in weakened rights protection, either in terms of rights or in terms of enforcement mechanisms; and

ii) the political motives of those who advocate the creation of a UK Bill of Rights are questionable, and involve a wish to withdraw from the European Convention system.

e) A UK Bill of Rights would weaken the UK's standing internationally.

The responses in this category included the following themes:

i) a UK Bill of Rights would weaken the UK's position at the supranational and international level;

ii) a UK Bill of Rights would have negative implications for the rule of law in other countries.

iii) a UK Bill of Rights would undermine the universality of human rights.

f) A UK Bill of Rights should only be considered within the framework of a new constitutional settlement, including a coherent federal framework allocating powers and duties across the United Kingdom.

7.29 Responses varied around the country as a whole. Support for the existing arrangements was stronger in Scotland, Wales and Northern Ireland, where we identified less support for a UK Bill of Rights. This was coupled with many expressions of the feeling in Scotland and Wales that discussions and decisions on proposed changes affecting the devolved institutions must necessarily involve the relevant parliaments or assemblies, and not merely be adopted by the UK Parliament.

Assessment

7.30 To the extent that there is support for the replacement of the Human Rights Act, it appears to encompass a range of possibilities in terms of the elaboration and definition of the rights to be protected, and the mechanisms of protection that might be adopted. One group of respondents, for example, opposes a UK Bill of Rights for fear that it would be 'HRA-minus', whilst another group supports a UK Bill of Rights by reason of their long-standing commitment to 'HRA-plus'. There is also a range of different possibilities favoured by those who wish to supplement the Human Rights Act.

7.31 The situation today is complex, engendered in part by the political climate in Britain today. For example, the British Institute of Human Rights expressed concern about "the current political and media commotion calling for the repeal or replacement of the Human Rights Act."[231] JUSTICE too has been influenced by the political climate: only a few years ago it combined a position of formal neutrality with considerable sympathy for a Bill of Rights. It appears now to have modified its position and is "not persuaded" of any argument for change, and doubts even that the debate is "appropriate" at this time.[232] Amnesty cautions that there should be "very careful thought" given "the current state of debate about human rights in the UK."[233] Liberty placed at the beginning of its response a quotation from a Tahrir Square veteran saying that for the

[231]Discussion Paper Response, p. 1.
[232]Consultation Paper Response, p. 1.
[233]Discussion Paper Response, p. 1.

UK to dilute human rights protections would set back the protection of the human rights of Egyptians.[234]

7.32 One reason why these concerns have changed the attitude of many of those who would previously have supported a Bill of Rights was succinctly expressed to us by Michael Fordham QC:

> "the fact is that a Bill of Rights idea...is one supported by a false coalition of two polarised camps: (a) those who would expand the ECHR and (b) those who would restrict it. So there are two ideas, at opposite ends and with the HRA being pulled in two directions. Both camps would scrap the HRA, but for opposite reasons....
>
> Any 'HRA-scrapping' suggestion is likely to be relied on by the restriction lobby. An extension model could even become a Trojan horse for restriction. Imagine the story: 'Commission calls for repeal of the HRA' and how that could be deployed."[235]

7.33 Thus it is not always easy to disentangle in the opinions expressed to us what are tactical positions rather than fundamental beliefs. A related problem is that some respondents indicated only rather faintly what their first preference position would be, since they feel it safer to emphasise the merits of the second preference, for fear of ending up with the third.

7.34 Some of the earlier arguments appear to have faded. Assuming that the protection and judicial remedies were no more powerful than those in the Human Rights Act, there are fewer voices today opposing a UK Bill of Rights on the ground that it would restrict Parliamentary sovereignty. By virtue of the UK's participation in the ECHR system, domestic legislation cannot prevent the Convention's impact on Parliamentary sovereignty by imposing obligations to abide by the final judgments of the European Court of Human Rights and to provide effective remedies for breaches of the Convention rights. Under such a model Parliament would remain free, if it wished to do so, to legislate contrary to the additional rights. Other arguments have turned upside-down. A UK Bill of Rights is no longer opposed on the ground that it would be un-British, and, on the contrary, the opportunity to strengthen the protection of British values and constitutional and political traditions is held up as an argument in its favour. Nor is the 'conservatism' of judges presented as an argument against a Bill, although what some see as the excessive readiness of judges to take an activist approach is seen as a harbinger of even more trouble ahead if the list of rights were to be expanded. The views expressed to us are, in considerable part, informed by increasingly polarised political debates about the relationship between the legislature

[234] Discussion Paper Response, p. 2.
[235] Discussion Paper Response, p. 1.

and the judiciary; the devolution of powers from a centralised UK Parliament to the legislatures of Northern Ireland, Scotland and Wales; and the United Kingdom's relationship to European and other international institutions.

7.35 Many of the arguments revolve around what are seen as good or bad features of the Human Rights Act. At the most obvious level are the arguments based on particular outcomes of the 1998 Human Rights Act. For example, Migration Watch considered that the Human Rights Act has had "baleful effects" in undermining proper immigration control, and oppose a Bill of Rights since it might take things even further in the same undesirable direction.[236] By contrast, several Roma organisations, amongst others, welcome the benefits which the Human Rights Act has brought for the protection of vulnerable minorities, and oppose anything which might restrict it.[237]

7.36 There is widespread agreement that the Human Rights Act has not won the degree of public acceptance that would be desirable. JUSTICE considers that the Human Rights Act is functioning well, whilst accepting that it has met with a negative response.[238] This leads some supporters of the Human Rights Act, such as the Equality and Human Rights Commission, to contend that the primary focus should be on improving public understanding of it.

7.37 However, other supporters of rights protection see better prospects in making something of a fresh start. For example, Merris Amos wrote:

> "whilst the HRA has provided an important remedy for claimants and resulting in lasting and important legal changes... it continues to have a very poor public image and enjoys very little respect... In a recent poll commissioned by the human rights organisation Liberty, 93% of respondents agreed that it was important 'that there is a law which protects rights and freedoms in Britain'. But this is not matched by support for the HRA...
>
> Whilst it might be possible to mend some of the problems with the HRA, others are now very difficult to unpick in particular the climate of disrespect surrounding it, created and perpetuated by political and public figures and the media. Starting again with a UK Bill of Rights, containing identical or better human rights guarantees, might overcome these difficulties and create more of a sense of ownership amongst the general public." [239]

[236] Discussion Paper Response, p. 2.
[237] See e.g. Irish Traveller Movement in Britain, Discussion Paper Response, pp. 1- 2.
[238] Discussion Paper Response, pp. 2-4.
[239] Discussion Paper Response, p. 1; see also Amos, "Problems with the Human Rights Act and how to remedy them: is a Bill of Rights the answer?" in (2009) 72 *Modern Law Review* 883-908.

7.38 There is also the view in some quarters that to connect the protection of minority rights to Europe is unnecessary and undesirable. Oliver Sells QC stated that:

> "this country had enjoyed such rights for many hundreds of years and the idea that a bountiful European Court was conferring them now on the UK citizens was never likely to be a popular one."[240]

[240]Discussion Paper Response, p. 2.

Chapter 8: The Language of Rights, Additional Rights, and Responsibilities

Introduction

8.1 As we set out in the Overview to our report, we are not unanimous as to whether we favour a UK Bill of Rights. Nevertheless, against the possibility that such a Bill is in the event taken forward, or that other options are pursued such as amendments to the Human Rights Act, we have given consideration to a number of issues about the potential content of such a Bill or such amendments. In this chapter, we therefore discuss the language in which any UK Bill of Rights might be written and we also consider whether any such Bill should contain additional rights beyond those contained in the Human Rights Act 1998. Finally we discuss the issue of responsibilities and some of the views that we have heard on whether and, if so, how such a concept might be included in any UK Bill of Rights or other instrument.

Expressing rights in a way that reflects the UK's heritage

8.2 In previous chapters, we have outlined the UK's long heritage of rights from the Magna Carta and Claim of Right through to modern times. We have also discussed the fact that the rights in the Human Rights Act 1998 are written in identical words to those in the European Convention on Human Rights.

8.3 We have had a number of arguments put to us that if there were to be a UK Bill of Rights it should be written in words which reflect the history of rights in the countries of the UK in order to create a greater sense of public 'ownership' of the rights in such a Bill. We have also noted that many other countries that are signatories to the European Convention on Human Rights have written their fundamental rights into their constitutions or other instruments in language that reflects their own national circumstances and history.[241] In chapter 5 we discussed how courts in these countries apply these fundamental rights in relation to international instruments such as the European Convention on Human Rights.

8.4 In our second consultation paper, we asked whether the rights and freedoms in any UK Bill of Rights should be expressed in the same or different language from that currently used in the Human Rights Act and the European Convention on Human Rights. We also asked what advantages or disadvantages there might be to expressing the rights in different language. Some respondents to our first consultation also addressed this issue. In total, approximately 100 respondents gave us views in this respect.

[241] We discussed a number of these countries in chapter 3 above.

8.5 A majority of these respondents were in favour of retaining the language as it stands in the European Convention on Human Rights and in the Human Rights Act. A number of them were concerned about the prospect of inconsistency between Convention rights and differently-expressed domestic rights. They thought that having two differently-worded instruments could complicate litigation and lead to increased costs and a lack of clarity in judicial decision-making. For example, in their response to our Consultation Paper, Liberty said that:

> "a decision to change the language in which rights and freedoms are expressed…would inevitably lead to litigation as our courts grapple with the interaction between this country's international obligations and domestic laws. If our objective is to encourage understanding and ownership of the human rights framework, a step which will lead to lengthy adversarial proceedings on the nuanced divergence between two human rights instruments is liable to prove counter-productive in the extreme."[242]

8.6 Some considered that the use of different language could also undermine the legal certainty associated with the UK's existing jurisprudence under the Human Rights Act. Moreover, to the extent that such change risked creating a substantive difference in rights as between a UK Bill and the Convention, some respondents thought that such inconsistency might well lead to an increase in cases being brought before the Strasbourg Court.

8.7 On the other hand, those who favoured using different language in a UK Bill of Rights generally did so because they thought that a new Bill of Rights would be more widely accepted as reflective of our domestic heritage and existing common law principles if it was in our own language rather than simply following the language of the European Convention. Some also thought that new language carried with it the possibility of reflecting changes in our society that have taken place since the immediate post-war period when the Convention was originally drafted. Ulster Human Rights Watch said in their response to our Consultation Paper that:

> "the advantage of using terms that are in line with British principles and concepts developed through common law is that of promoting its own interpretation of the rights and freedoms based on its unique and exemplary history, tradition and Judeo-Christian heritage. The terms used in the European Convention were satisfactory at the time the Convention was written after the Second World War, but as a result of the ever-evolving interpretation given by the European Court of Human Rights, the meaning of the words used in the Convention has changed regularly. The use of appropriate terms would enable the United

[242] P. 4.

> Kingdom to recover the freedom to provide and develop its own interpretation of rights and fundamental freedoms."[243]

8.8 Having considered these arguments, our own conclusion is that if a UK Bill of Rights were to be introduced in the future, there is a strong case at least in principle for drafting it in language reflecting our own heritage and tradition. That would reflect our view, more fundamentally, that a strong argument in favour of a UK Bill of Rights would be to gain greater public ownership of the rights it contained. It would seem both self-defeating and counter-productive to go down such a road but then to use identical language to that in the Convention. Accordingly, while we do not under-estimate the challenges involved in doing so, we conclude that the effort should be made if there were to be a UK Bill of Rights to use wording reflecting our own history and circumstances in order that such a Bill would indeed be seen as having originated here.

Additional rights

8.9 Our terms of reference called on us to investigate the creation of a UK Bill of Rights that incorporates and builds on all of the UK's obligations under the European Convention, and that protects and extends our liberties. It is clearly compatible with these terms of reference to consider whether, if there were to be a UK Bill of Rights, it should contain any rights additional to those Convention rights which have already been incorporated into UK law.

8.10 During the course of the Commission's work, we received a substantial number of submissions on this subject, including approximately 300 responses to our two consultation papers. Of these over 80% supported the inclusion of one or more additional rights in any UK Bill of Rights. It is important to recognise, however, that somewhat over half of these respondents were either opposed to or equivocal about such a Bill in principle and were therefore responding only against the contingency that such a Bill nevertheless went ahead.

8.11 The most frequently supported candidate put forward by those advocating additional rights was for any UK Bill of Rights to incorporate explicitly the rights in other international instruments – such as the United Nations Convention on the Rights of the Child – which the UK has signed but not incorporated into our domestic law. The next most strongly supported categories were, in order of preference, socio-economic rights and equality rights. Entirely as was to be expected, organisations which advocated particular rights tended to favour those rights which reflected their own purpose and mission.

[243] P. 5.

8.12 On the other hand, those who opposed additional rights did so because they viewed existing protection to be sufficient; or because they were wary about ceding further power to the judiciary; or because they considered that the inclusion of further rights would present considerable practical difficulties in defining them. Some respondents were also worried that one outcome of including additional rights could be to lay public bodies, and thus ultimately the taxpayer, open to potentially very large additional costs if courts were to rule that existing provision was insufficient to satisfy such rights. Others were suspicious about the political motives behind the protection of further rights and concerned that future legislative measures to this effect might be used as a 'smokescreen' to undermine the existing provisions of the Human Rights Act.

8.13 Our own conclusion, having considered these arguments very carefully, is that, given the many technical and substantive challenges posed by consideration of inclusion of these rights, we do not believe that we are sufficiently experienced or expert to be able to reach definitive judgments on these issues. Rather, we believe these questions would be better addressed if and when a UK Bill of Rights was being considered in more detail by the UK Government and Parliament, the devolved administrations and legislatures and the wider UK public. However, we do wish to put forward certain principles in relation to additional rights which we consider to be consistent with our terms of reference.

8.14 Firstly, we do not oppose the concept of additional rights in principle if a UK Bill of Rights were to be taken forward. It is now over half a century since the European Convention on Human Rights was drafted and society has moved on very considerably in that period. The advent of the internet, technological and scientific developments, the presence of transnational networks and the frequency of cross-border movement are all factors that give rise to questions of fundamental rights that were not and could not have been in the minds of the drafters of the original Convention as it emerged in the early 1950s. If the Convention as a whole was being drafted from scratch today, it would undoubtedly be different in some respects from the Convention which emerged in the aftermath of World War Two. So we think it entirely right that, were there to be a Bill of Rights, consideration should be given to whether it should contain certain rights in addition to those in the original Convention.

8.15 Secondly, we conclude that amongst the additional rights which might be most readily considered in any UK Bill of Rights are those which relate to people's fundamental rights to be treated equally irrespective, for example, of their innate characteristics such as their gender or ethnic origin. The most obvious candidate for inclusion would be the right to equality and non-discrimination currently enshrined in the Equality Act 2010 and in Protocol 12 of the European Convention on Human Rights which has not yet been ratified by the United Kingdom. That would, in our view, be a natural extension of the rights that the Human Rights Act already protects.

8.16 Thirdly, and conversely, a majority of members believe that it is undesirable in principle to open up to decisions of the judiciary issues which are better left, in their view, to elected legislatures. In the view of these members what are termed 'socio-economic' rights – such as a right to healthcare or education – in practice often involve very difficult choices over the allocation of scarce resources. Similarly, in the view of a majority of members, 'environmental rights' would inevitably give rise in practice to very difficult choices between competing considerations and philosophies. All other things being equal, a majority of members believe that such choices are better made by Parliaments rather than judges. Those members not taking this view believe by contrast that, as in other jurisdictions, socio-economic rights – for example in relation to health care and the environment – can in practice be drafted in such a way as to make them suitable for application by judges; these members note that the law in the United Kingdom and under the European Convention already recognises and gives practical effect to socio-economic, and this has not given rise to notable difficulties before the courts.

8.17 Fourthly, whilst we believe strongly that there should be an irreducible core of rights available to everyone in the UK, we conclude that, if there were to be a UK Bill of Rights, it should be open to the devolved legislatures to legislate within their devolved competence for specific additional rights within their jurisdiction. An existing example in this regard is the introduction in 2010 by the Welsh Assembly of a legal duty on Welsh Ministers to have due regard for the rights and obligations in the United Nations Convention on the Rights of the Child and its Optional Protocols in exercising any of their functions under the Government of Wales Act 2006. We would want strongly to support the right of the devolved administrations and legislatures, in their areas of competence, to be able to introduce additional rights if, but of course only if, they thought it right to do so.

8.18 Against this background we turn now to setting out the views which we received on a number of possible additional rights in respect of which we invited views in our second consultation. Save where specifically noted we have reached no definitive conclusion on the case for the inclusion of such rights in any UK Bill of Rights other than that set out in paragraph 8.13 above.

A right to equality

8.19 We asked for views on whether a UK Bill of Rights should contain a free-standing right to equality. As we discuss in more detail in chapter 6, the right to equality is a well-established constitutional value and legal standard in the UK. In 2006 and 2010, the UK Parliament passed Equality Acts, which consolidated UK anti-discrimination protections to provide that individuals should not be subject to discrimination in respect of a list of protected characteristics. In Northern Ireland, where anti-discrimination law is a devolved competence, the Northern Ireland Assembly has made legislative provision for a range of equality rights and is considering a 'Single

Equality Act' for Northern Ireland, along the lines of the Equality Act 2010. Legislation has established the Equality and Human Rights Commission to monitor and preserve equality rights in England, Scotland and Wales; and the Equality Commission for Northern Ireland, which monitors provisions in the Northern Ireland Act 1998 in relation to equality of opportunity.

8.20 Protocol 12 to the European Convention is designed to augment the Convention's protection of equality beyond the right set out in Article 14, which guarantees a right to non-discrimination only in the enjoyment of other rights under the Convention. The Protocol prohibits discrimination by public authorities on any ground, including (but not limited to) sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[244] However, the United Kingdom has not ratified this Protocol. In the absence of ratification of Protocol 12 and further legislative provision to incorporate it into domestic law, it is primarily the Equality Acts, rather than the Human Rights Act, that provide that individuals in the UK should not be subject to discrimination in the provision, for example, of services or goods; or in employment decisions.

8.21 Approximately 50 respondents to our consultations advocated the inclusion of a free-standing right to equality in any UK Bill of Rights. They believed that such a right would reinforce the UK's international human rights obligations as well as bring the UK more closely into line with a large number of other countries that have a constitutional guarantee of equality and equal protection before the law. Respondents put forward differing opinions regarding whether the right should be expressed as a right to equality or a right of non-discrimination. However, many respondents preferred inclusion of such a right by ratification of Protocol 12 of the Convention, or by other means, rather than by enactment of a UK Bill of Rights. For example, Baroness Whitaker wrote in response to our second consultation that:

> "I do not think there should be a Bill of Rights. There is scope for clarifying, in the HRA, that any organisation carrying out a public function, e.g. a care home to which local authorities refer people, should be bound by the HRA. It would also be a step forward if the government were to adopt Protocol 12 of the ECHR and thus add a freestanding right of equality. But this does not require a further instrument."[245]

8.22 Others suggested that a free-standing right could be modelled on Article 26 of the International Covenant on Civil and Political Rights,[246] Title 3 of the EU Charter on

[244] Art. 1 of Protocol 12.

[245] Consultation Paper Response, p. 1.

[246] Art. 26 of the ICCPR reads 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

Fundamental Rights,[247] or Section 9 of the South African Bill of Rights.[248] By contrast, a small number of respondents to our consultations opposed the inclusion of a free-standing equality right. Most did so because they felt that equality was an area that ought to remain as flexible as possible, and a matter for Parliamentarians rather than courts to decide, given the level of fluctuation over time of views about appropriate ways to legislate in this area.

8.23 Having considered these arguments carefully, our own conclusion is that, if there were to be a UK Bill of Rights, the Government should carefully consider the inclusion within it of a free-standing right to equality. The most obvious candidate for inclusion would be the right to equality and non-discrimination currently enshrined in the Equality Act 2010 and in Protocol 12 of the European Convention on Human Rights. Any consideration of this issue would need, of course, to take into account the position in Northern Ireland in respect of the devolution of equality matters.

Socio-economic and environmental rights

8.24 Neither the European Convention on Human Rights nor the Human Rights Act makes explicit provision for a category of rights known as socio-economic rights. Such rights, which are found in a number of Bills of Rights in other countries, can include the right to adequate healthcare and housing, a right to education, a right to a minimum standard of living and a range of other social security entitlements. In those countries where such rights exist they are generally expressed as 'positive' rights in that rather than requiring states to refrain from certain actions they require them to act in certain ways or to allocate resources towards particular ends.

8.25 Approximately 100 respondents to our two consultations expressed a view on the possibility of including socio-economic rights in a UK Bill of Rights. Of those who did the majority were in favour of such rights, though some were equivocal and a small number opposed their inclusion. We received more mixed views on whether such rights ought to be justiciable. Some respondents were in favour of a purely aspirational statement of socio-economic rights; others were in favour of such rights being subject to the principle of 'progressive realisation' (along the lines of the South

[247] Ch. 3 of the EU Charter contains provision for equality before the law (Article 20), non-discrimination (Article 21), cultural, linguistic and religious diversity (Article 22), equality between men and women (Article 23), the rights of the child (Article 24), the rights of the elderly (Article 25) and the integration of persons with disabilities (Article 26).

[248] S. 9 of the South African Bill of Rights reads '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds listed in subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection 3 is unfair unless it is established that the discrimination is fair'.

African constitution and international treaties on economic, social and cultural rights), meaning that such rights are to be implemented by a state only to the extent that it has the resources to do so. Others argued for fully justiciable socio-economic rights. A minority of these respondents were also in favour of the incorporation of a duty obliging public authorities to assess the impact of any draft primary or secondary legislation on the enjoyment of such rights.

8.26 Many advocates of justiciable or quasi-justiciable socio-economic rights thought that such rights were so intrinsically linked with civil and political rights that they should be given a status equal to them. For example, Unlock Democracy said that:

> "Unlock Democracy upholds the basic principle of international human rights law that civil and political rights, and economic, social and cultural rights, are indivisible; and considers therefore that socio-economic rights should take their place in a British Bill of Rights."[249]

8.27 These respondents observed that such rights were already justiciable or quasi-justiciable in some foreign jurisdictions and argued that the UK had already committed to the principles behind socio-economic rights legislation by proclaiming the Universal Declaration of Human Rights and by ratifying the International Covenant on Economic, Social and Cultural Rights. On the other hand, those opposed to the incorporation of socio-economic rights into UK law argued that the allocation of public resources is a question of political judgment rather than a matter for the courts. They noted as well that all of the European Convention rights were framed to protect political, civil and economic freedoms, rather than to confer socio-economic or environmental rights.

8.28 In this respect the conclusion of a majority of our members, if there were to be a UK Bill of Rights, is that we would be hesitant about it containing socio-economic and environmental rights. Many decisions of this kind that might be regarded as involving rights in practice involve the allocation of scarce resources. Thus, for example, a decision to deny a potentially life-saving form of treatment to one category of patients may well involve having, within the resources available, to restrict or deny an alternative form of treatment to a differing category of patients. A decision to provide, or not to provide, housing support to a particular group or category of potential recipients will similarly often involve not being able to provide such support, given the overall scarcity of available housing, to one or more other such groups or categories. Similar considerations, we believe, attach to environmental rights. Whether, for example, nuclear energy should or should not be pursued, or further measures taken to reduce global warming, are self-evidently complex issues both technically and politically. Overall, a majority of us believe that such decisions are in general better

[249] Discussion Paper Response, para. 38.

taken by other organs of government, which are better placed to make such decisions and are accountable for them than by the judiciary.

Children's rights

8.29 Some 50 respondents to our consultations advocated the inclusion of children's rights in any UK Bill of Rights. Many of these favoured incorporation or reference to the UN Convention on the Rights of the Child, which protects children against discrimination, neglect, exploitation and harm; contains provisions to enable children to satisfy basic needs, such as those relating to safety, health and supervision; and provides a right for children to participate in decisions affecting their destiny. The UK has ratified this Convention and the first two of its Optional Protocols. In addition, the Welsh Assembly has legislated to create a duty on Welsh Ministers to have due regard for the rights and obligations in the Convention on the Rights of the Child and its Optional Protocols in exercising any of their functions.

8.30 Those in favour of the inclusion of such additional rights emphasised that children are particularly vulnerable and in need of further protection as a result. For example, the Children's Rights Alliance for England noted that:

> "children have additional needs and entitlements which adults do not share and which are not, therefore, reflected in more general human rights treaties, and are not protected by the Human Rights Act and the ECHR."[250]

8.31 However, not all those who favoured the expansion of children's rights in UK law felt that this would be best addressed via their inclusion in a UK Bill of Rights. Others emphasised that children's rights raise specific problems which would be better addressed by specific legislation. For example, the UK Independence Party argued that:

> "we do not believe it is necessary for there to be any further elucidation of children's rights in such a document. This is a matter which can properly be dealt with by Parliamentary Legislation."[251]

Rights for elderly persons

8.32 The elderly are another group in the UK that may stand to benefit from legislative provision to protect their human rights. A number of respondents to our consultations raised the issue of additional rights for elderly people. They pointed out that at more advanced ages people are more likely to rely on the services of the state and may need assistance in safeguarding their dignity and safety. For example, Age UK wrote in response to our consultations that:

[250] Consultation Paper Response, p. 4.
[251] Consultation Paper Response, p. 4.

> "Age UK would like to see a UK Bill of Rights that widens and equals the scope of the human rights protections offered to older people by the HRA, to cover existing gaps and anomalies. At the moment, only those older people whose residential care costs in private care homes are met by the local authority are protected by the HRA….The UN Principles for older persons should be incorporated into any additional Bill of Rights. This should reflect (and where possible give additional force to) the rights contained within the UN Convention on the Rights of Persons with Disabilities."[252]

Rights in relation to the administration of justice

Rights to administrative justice

8.33 A separate category of possible additional rights which might be included in any UK Bill of Rights are ones we refer to as rights to administrative justice. These are rights which apply both to how our courts and legal systems work, and the protections they provide, and to how public bodies and authorities act in reaching decisions in their areas of responsibility.

8.34 We asked respondents to our second consultation whether any UK Bill of Rights should include any such additional rights to administrative justice. As we noted in our Consultation Paper, administrative decisions are made by governmental and public officials and bodies, and can affect almost every aspect of life, including entitlements to welfare benefits, education, healthcare, immigration status, compensation for industrial injury and many other areas that touch upon the lives, rights and standards of living of millions of people every year. Rights to administrative justice may concern the process through which such decisions are made, the right to a hearing through which an administrative decision can be contested, the right of access to information used by a decision-maker, or the right to be given reasons for certain decisions.

8.35 Approximately 40 respondents to our consultations expressed a view on whether additional rights to administrative justice should be included if there were to be a UK Bill of Rights. Most were in favour of such rights, some were equivocal and a few opposed to such rights. Proponents argued that a right to administrative justice in a UK Bill of Rights could set out or build on the common law rights that already exist. They argued that inclusion of such rights in a UK Bill of Rights would give them the same status as Convention rights in domestic law; would enable Parliament to enhance the visibility and value of such rights; and would strengthen public confidence in good administration. On the other hand, those opposed to further rights relating to administrative justice were cautious about overriding the principles and review mechanisms that already exist at common law.

[252] Discussion Paper Response, p. 10.

8.36 Most of those who advocated further additional rights expressed the view that the current scope of Article 6 of the European Convention on Human Rights, referring only to 'civil rights and obligations', provides insufficient protection in respect of such issues. Some pointed to examples of rights to administrative justice found in other instruments more comprehensive than Article 6. For example, section 33 of the South African Constitution provides for a right to just administrative action:

> "**33. Just administrative action**
>
> Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
>
> National legislation must be enacted to give effect to these rights, and must:
>
> a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>
> c. promote an efficient administration."

8.37 Article 41 of the EU Charter of Fundamental Rights also sets out a right to good administration:

> "**41. Right to good administration**
>
> 1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the Institutions, bodies and agencies of the Union.
>
> 2. This right includes:
>
> - the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
>
> - the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
>
> - the obligation of the administration to give reasons for its decisions.
>
> 3. Every person has the right to have the Union make good any damage caused by its Institutions or by its servants in the performance of their

duties, in accordance with the general principle common to the laws of the Member States.

4. Every person may write to the Institutions of the Union in one of the languages of the Constitution and must have an answer in the same language."

Right to trial by jury

8.38 Another possible additional right, if there were to be a UK Bill of Rights, would be a right in certain circumstances to trial by jury. In England and Wales, such a right has long been recognised by the common law, though some argue that its restriction in recent years by Parliament in cases involving, for example, jury tampering, fraud, and certain criminal charges relating to domestic violence has unacceptably undermined that right.[253]

8.39 Approximately 40 respondents to our consultations expressed a view on the possible inclusion in any UK Bill of Rights of a right to trial by jury. The majority of these were in favour of the inclusion of such a right and stressed its importance within the UK legal system. For example, the Law Society of England and Wales stated that:

> "the lawful judgment of one's peers is a concept enshrined as long ago as 1215 in the Magna Carta. It is a practice that allows for civic participation and representation in the criminal justice system and ensures that one class of person does not sit in judgment over another. Therefore, it should be included in a BoR."[254]

8.40 The Law Society also pointed out that Article 6 of the European Convention on Human Rights does not include the right to trial by jury, referring more broadly to the right to determination of civil rights, obligations and criminal charges by an 'independent and impartial tribunal established by law'.

8.41 There are a number of forms that a right to trial by jury could take. For example, Article 11(f) of the Canadian Charter of Rights and Freedoms states that

> "11. Any person charged with an offence has the right…
>
> (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.**"**

[253] Respondents referred in particular to ss. 43-50 of the Criminal Justice Act 2003 and s. 16 of the Domestic Violence, Crime & Victims Act 2004.
[254] Discussion Paper Response, p. 7.

8.42 Other respondents, however, argued that trial by jury may be inappropriate in highly complex cases, such as those involving serious fraud. Others were concerned that too rigid an expression of a right to trial by jury could inhibit reasoned development of criminal procedure in this respect. Finally, a number of respondents were concerned that, in the light of the difference in criminal jurisdictions within the countries of the UK, in particular in the light of the differences in Scotland with respect to trial by jury,[255] it would be difficult to include a right to trial by jury that took these differences sufficiently into account.

Other rights in respect of criminal and civil justice

8.43 In our Consultation Paper, we also asked whether any UK Bill of Rights should contain additional rights for accused persons. Certain rights of the accused exist at common law, including the right to be free from arbitrary arrest and detention, the standard of proof in criminal proceedings, the right to 'confront' one's accuser and witnesses, and the right of access to a court. Approximately 50 respondents to our consultation expressed a view on the possibility of including such additional rights in any UK Bill of Rights. Proponents argued that the level of protection for accused persons in Articles 5, 6 and 7 of the European Convention on Human Rights, which primarily concern the right to liberty and a fair trial, are insufficient. They argued that a UK Bill of Rights should spell out more clearly the protections already afforded in the common law. Some also proposed that any person facing a so-called 'civil penalty' or any form of civil award should be entitled to a proper hearing on the substantive merits, either at first instance or on appeal.

8.44 Overall our conclusion is that all of these rights which we have termed rights in relation to the administration of justice should be carefully considered for inclusion in a UK Bill of Rights if there were to be one. Clearly this would require very careful examination in each case and, particularly in the case of any potential right to trial by jury, would need fully to respect the different tradition and practice in respect of jury trial in Scotland.

The UK's international obligations

8.45 Approaching 100 respondents to our consultations were in favour of the incorporation into any UK Bill of Rights of rights contained in international instruments which the UK has already signed but not fully incorporated into our domestic law. As we discussed in chapter 4, the United Kingdom has ratified a number of instruments relating to the protection of vulnerable groups, including the UN Convention on the Rights of the Child, the UN Convention on the Rights of People with Disabilities, the UN Convention Relating to the Status of Refugees and UN Principles for Older Persons.

[255] See para. 9.6 below.

8.46 Some respondents to our consultations advocated the direct incorporation into any UK Bill of Rights of one or more of these international instruments or of certain articles within them. They expressed the view that doing so would represent a natural extension of the Government's commitments; would be consistent with the UK's long-standing reputation for respect for human rights; and would boost the UK's credibility in promoting human rights overseas. Other respondents thought that the wording in particular international instruments could be used as a basis for the wording in any UK Bill of Rights. However, not all respondents in favour of incorporation of international instruments were in favour of a UK Bill of Rights. In particular, many of those who expressed support for the Human Rights Act favoured the incorporation of additional rights via separate legislation existing alongside the Human Rights Act, rather that replacing it. For example, the Irish Traveller Movement in Britain wrote in response to our second consultation that:

> "ITMB believes that whilst UK Human Rights can be strengthened to incorporate international conventions and covenants, for the purposes of this consultation any recommendations should not be interpreted as justification for replacing the HRA [Human Rights Act] with a BOR [Bill of Rights]."[256]

Balancing qualified and competing rights

8.47 Qualified rights are rights that the state can lawfully interfere with in certain prescribed circumstances, where such interference promotes a specific legitimate aim, such as national security, public safety, the prevention of public disorder or crime, or the protection of the rights of others. Convention rights which are qualified in this way include the right to respect for a private and family life (Article 8), the right to freedom of thought, conscience and religion (Article 9), the right to freedom of expression (Article 10), the right to freedom of assembly and association (Article 11) and the right not to be subject to discrimination in the application of Convention rights (Article 14).

8.48 It is for the judiciary to strike the balance between legitimate and illegitimate interference with rights as required by the wording of the Convention rights. Self-evidently this balancing exercise becomes particularly important where two qualified rights come potentially into conflict. One frequently cited example is the right to personal privacy under Article 8 and the right to freedom of expression under Article 10. When private information or potentially defamatory allegations about an individual are published in the media, the courts are required to strike a balance between the privacy rights of the individual and the media's freedom of expression. The line at which individual privacy should give way to freedom of expression has been debated widely, by the media, Parliament and the public as well as the courts.

[256] P. 5.

8.49 In our Consultation Paper we asked whether a UK Bill of Rights should give further guidance to the courts in striking the balance between qualified and competing Convention rights and freedoms. Section 12 of the Human Rights Act already provides some guidance to the judiciary in this respect by emphasising that the court must have 'particular regard' to freedom of expression with regard to publication of journalistic, literary or artistic material in the public interest. Similarly, section 13 instructs courts to have 'particular regard' to the importance of the right to freedom of thought, conscience and religion when considering questions that may affect exercise of this right by a religious organisation.

8.50 Just over 100 respondents to our consultations addressed this issue. Around a quarter of these respondents were in favour of giving more guidance to the courts than is currently provided by the Human Rights Act and by Convention case law. Of the minority of respondents on this issue who did favour providing additional guidance, a number considered that, to the extent that the resolution of issues of competing Convention rights currently falls to the courts, the present position may undermine the position of Parliament. They expressed the view that where difficult public policy balances need to be found, it should be for Parliament to decide such questions rather than the judiciary. The majority who opposed further guidance, on the other hand, took the view that judges are generally better equipped to deal with issues of balancing competing rights than the legislature. A number of these respondents argued that, whilst questions of policy and politics are the traditional preserve of the legislature, questions of balancing fundamental rights in particular circumstances have long been a matter for the courts. Some thought that the measure of judicial discretion inherent in existing arrangements enabled judges to tailor their decisions more responsively to the circumstances of particular cases than would be possible within a framework of more rigid guidance.

8.51 On balance our conclusion, in line with that of the majority of respondents on this issue, is that if there were to be a UK Bill of Rights the balancing of competing rights within such a Bill, where such occurred, would be better left to the courts not least because of their ability to weigh the competing considerations against the facts of the particular case before them.

The Role of Responsibilities in a UK Bill of Rights

8.52 As noted earlier in this report, the issue of whether there should be inclusion of, or at least reference to, the notion of responsibilities in any UK Bill of Rights, has been one on which there has already been very considerable public debate.

8.53 It is undoubtedly the case that concepts of duty and responsibility figure in many aspects of our lives, such as in our duty to obey the law and in our responsibilities to our children. Notions of responsibilities have been incorporated into current and historic bills of rights in other countries, generally in aspirational or declaratory

provisions. The previous Government consulted on these issues as part of a wider constitutional reform consultation process without arriving at firm conclusions,[257] and the Joint Committee on Human Rights considered the issue in 2008.[258]

8.54 At our Birmingham seminar in March 2012, we were ourselves struck by the strength of feeling, predominantly from amongst the faith communities that were present, that rights could not be discussed in isolation from responsibilities. In our consultations, we also received approximately 140 responses expressing views on the issue of responsibilities, around a quarter of which were in favour of the inclusion of some concept of responsibilities in any UK Bill of Rights.

8.55 However, the majority of respondents on this issue were opposed to including the notion of responsibilities in a UK Bill of Rights, at least to the notion that a person's access to rights should be contingent on the fulfilment of responsibilities. Those who opposed the inclusion of a concept of responsibilities in a UK Bill of Rights generally did so on the assumption that the inclusion of such a concept would mean that rights would have to be earned or that rights would be conditional upon the fulfilment of responsibilities. They believed such a position would undermine the universal and inalienable nature of fundamental rights, in some cases also noting that such an approach would be contrary to the UK's international obligations.

8.56 Many respondents also argued that responsibilities were in practice already present within the fabric of our present human rights legislation, not least by reference to many of the balancing tests in the European Convention itself. They noted that there were very few absolute rights under the Convention and that both the Convention and the Human Rights Act already focused, correctly in their view, on the rights of others and the wider public interest. For example, the human rights charity, René Cassin, said in response to our consultations that Convention rights are constantly weighed "against the general good of society, such as public health or national security. This is responsibilities by another name."[259] Others made the point that responsibilities were already embedded in our legal system by virtue of individuals who break these laws being subject to punishment through the normal criminal justice system.

8.57 Some respondents also highlighted what they saw as the practical difficulties of including reference to responsibilities in a UK Bill of Rights, such as in deciding which responsibilities should be included and agreeing on how they should be enforced.

[257] See Green Paper, *Rights and Responsibilities: developing our constitutional framework*, 2009; and the subsequent report, Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework, Summary of responses*, 2010.
[258] Joint Committee on Human Rights, *A Bill of Rights for the UK*, Twenty-ninth Report of Session 2007-8, HL Paper 165-I, HC 150-I,10 August 2008.
[259] Discussion Paper Response, p. 7.

8.58 On the other hand, those who advocated the inclusion of responsibilities in a UK Bill of Rights urged that this could help preserve or rehabilitate the value and legitimacy of rights. Father Stephen Wright submitted that:

> "The proliferation of alleged rights can devalue the very concept, so can the amplification [of rights] without equivalent stress on duties…or some concept of the common good to which we all have an obligation to contribute."[260]

8.59 Some respondents, while opposed to making rights conditional upon the fulfilment of responsibilities, argued that one way in which a concept of responsibilities might be included in a UK Bill of Rights would be through some sort of declaratory statement, perhaps in a preamble, that would set out the importance within our society of our mutual responsibilities to one another. This would mean that the provisions would not be enforceable, but would serve to remind all members of society that they owed certain duties and had certain responsibilities.

8.60 Another possibility advanced by some of those with whom we discussed these issues was to build on the common law principle that public law remedies are discretionary by providing that when considering what damages to award for breach of human rights courts could take account of the extent to which the applicant in question had fulfilled his or her responsibilities.

8.61 Having considered the arguments carefully our own conclusion is that it is in the nature of human rights that they exist for all human beings equally without reference to whether they are 'deserving' or not and that they cannot be made directly contingent on the behaviour of the individuals concerned. We thus do not believe, if there were to be a UK Bill of Rights, that the rights it contained should be made conditional upon the exercise of responsibilities. We do believe, however, that the formulation to be found in a number of the existing Articles in the European Convention on Human Rights whereby the rights in question are subject to such exceptions as are necessary in a democratic society for, amongst other things, the protection of the rights and freedoms of others is one which should be emphasised in any UK Bill of Rights. We also believe that a UK Bill of Rights, if there were to be such a Bill, should contain a jurisdiction for a court to award damages but that this course should be discretionary and that in reaching such decisions the courts should be directed to take into account the conduct of the applicant.

8.62 This leaves open the question of whether, if there were to be a UK Bill of Rights, it should contain some form of declaratory provision, perhaps in a preamble, setting out the importance within our society of our mutual responsibilities to one another. For the

[260] Father Stephen Wright, Commission seminar: Human Rights in the Community: Perception, Sentiment and Experience, 13 June 2012.

reasons set out above it would be important to be clear that such a statement was purely declaratory and not justiciable. But, subject to that, we conclude that, if there were to be a UK Bill of Rights, a declaratory (but non-justiciable) provision within it should certainly be considered as a means of attaching importance in a key constitutional instrument to the mutual ties and obligations on which society depends and of assisting its broad acceptance.

Chapter 9: Devolution and a UK Bill of Rights

Introduction

9.1 When the Commission was first established, many had not considered the complications created by this being a kingdom of different nations. Scotland has its own system of law. And although England and Wales share a legal system, since devolution, the power to make primary legislation and to exercise executive functions has been enjoyed by the National Assembly and the Welsh Government. In Northern Ireland there has been the "peace process", bringing to an end many years of conflict, and part of the settlement has been a commitment to create a Bill of Rights suited to the special circumstances of that part of these isles.

9.2 Members of the Commission visited Northern Ireland, Scotland and Wales to discuss with a wide range of individuals and bodies the possible creation of a UK Bill of Rights. We received many responses to our consultation papers from those in Northern Ireland, Scotland and Wales.

9.3 Although polling conducted by third parties[261] suggests there is little difference across the UK in support for a UK Bill of Rights with a marginal majority in favour of such legislation, when we had meetings in those countries there appeared to be little support for a UK Bill of Rights. Calls for a UK Bill of Rights were generally perceived to be emanating from England only. There was little, if any, criticism of the Strasbourg Court, of the European label of the Convention, or of human rights generally in Scotland, Wales or Northern Ireland.

9.4 As we took evidence, proposals for a UK Bill of Rights were generally regarded with some scepticism, particularly in Northern Ireland and Scotland, where the still fragile peace and the independence debate respectively caused many to believe that a Westminster-led initiative to enact a UK Bill of Rights could strengthen nationalist sentiment, particularly if it were undertaken to the exclusion of a Bill of Rights for Northern Ireland, and/or in parallel to the campaign for independence in the run-up to a referendum in Scotland. In Wales, where such immediate tensions are absent, it seemed clear that in the wake of the recent extension of the devolution settlement a UK Bill of Rights project was not high on the public agenda and was seen by some as potentially posing risks to the public policy balances that Wales was achieving on its own.

[261] An example of such polling is the survey by YouGov on behalf of the Sunday Times conducted on 29-30 Sept 2011 which asked 2,333 adults across the UK whether they would "support or oppose the introduction of a separate British Bill of Rights."

9.5 This said, these views were not universally held, with some voices, including a small number of individual, elected and/or NGO voices, saying either that a UK Bill of Rights was desirable, or at least that they could see the potential benefits provided that it was 'Human Rights Act-plus'. Some in Northern Ireland saw a UK Bill of Rights as a potential way of helping to break the current logjam over a Northern Ireland Bill of Rights. Others expressed the view that the Human Rights Act worked well and, although any change to the status quo was not needed as such, it might be desirable.

9.6 Notwithstanding these overall views there was a general willingness on the part of most interlocutors to discuss what a UK Bill of Rights might comprise, if there were to be one, and in some cases to discuss the general structure it might take within the framework of the existing devolution settlements. There was, for example support for the inclusion of many of the UK's obligations under international instruments. There was also some discussion of a right to jury trial, while noting that the jury trial system differed across the UK, in particular in Scotland where the prosecutor has, within limits, a discretion as to the court in which a case will be tried.[262] There was also a willingness among some to consider the possibility of a UK Bill of Rights that comprised different sections in respect of each country, or at least a "cluster of separate instruments" to recognise that different parts of the UK had different priorities or approaches. However, considerable concern was expressed about the potential legal, political and constitutional ramifications of such an approach.

Northern Ireland

9.7 In Northern Ireland, discussion of a UK Bill of Rights was invariably linked to discussion of a separate Bill of Rights for Northern Ireland. The Belfast/Good Friday Agreement, signed in 1998, created the Northern Ireland Human Rights Commission (NIHRC) and tasked it with submitting advice to the UK Government on "the scope for defining in Westminster legislation, rights supplementary to those in the [European Convention on Human Rights], to reflect the particular circumstances" of Northern Ireland. The NIHRC submitted its advice in 2008.

9.8 As we learned in Belfast, this dimension of the Belfast/Good Friday Agreement was, and remains, politically charged. While a number of our meetings and responses demonstrated continuing cross-community support for a Northern Ireland Bill of Rights, many expressed doubt as to whether the communities in Northern Ireland could ever agree on the specific content of such a Bill.

[262] Where the case is tried on indictment in the High Court or the Sheriff Court, it will be tried by jury. Where it is tried by summary procedure it is tried by a judge sitting alone. Certain serious charges (e.g. murder) can be tried only on indictment, and to that extent, the accused has a 'right to jury trial'.

9.9 Recent statements from UK Government ministers that a UK Bill of Rights – possibly with a section for Northern Ireland – could provide an appropriate vehicle for any additional rights in respect of Northern Ireland, have clearly concerned some people and left them wary of any Westminster-led UK Bill of Rights, and to some extent of the Commission's work. Some thought that the creation of the Commission was being used as simply the latest reason for stalling the process for creating a Northern Ireland Bill of Rights and, at worst, risked jeopardising it altogether, an outcome that they believed could have significant political ramifications in Northern Ireland. Others were less averse seeing the Commission as a possible means of breaking the current logjam; we were told several times that the creation of the Commission, and indeed its visit, had at least had the benefit of forcing politicians to re-address the issues.

9.10 In general so omnipresent was the issue of a Bill of Rights for Northern Ireland in any discussion of a UK Bill of Rights that it was often difficult to discern from the meetings and the responses from Northern Ireland whether there was any feeling that a UK Bill of Rights was needed on its own merits or whether there was a case for or against one. A small number of respondents did say that a UK Bill of Rights was desirable, though of the two that gave reasons for this, one appeared to base its reasons on the UK Bill of Rights forming part of a written constitution.

9.11 Nevertheless, some expressed views on what a UK Bill of Rights might contain, generally saying that it needed at least to maintain current levels of rights protection, and also mentioning possibilities for additional rights, such as:

- rights considered fundamental by the common law or those which were already in long-standing legislation passed by the UK Parliament;
- rights that had already been 'accepted as part of UK law' through the incorporation of international obligations into domestic legislation;
- rights contained in international human rights treaties which had not yet been incorporated into domestic law (including those in respect of vulnerable groups);
- economic, social and cultural rights; and
- a right to equality.

Scotland

9.12 In Scotland, the issue of a UK Bill of Rights was in general seen as inextricably linked to the current debate about the constitutional position of Scotland within the United Kingdom.[263]

9.13 The Scottish National Party's campaign for an independent Scotland has, of course, been galvanised following the Scottish Parliamentary elections in May 2011 which led to the formation of the current majority SNP Government. Since then, the parliamentary passage of what is now the Scotland Act 2012 and related discussions on the scope of the current devolution settlement, the role of the Supreme Court in respect of Scottish cases and agreement on the basis for a referendum on independence for Scotland have occupied much of the political agenda in Scotland.

9.14 Against that background, it was clear from the discussions in Edinburgh that any consideration of a UK Bill of Rights will be viewed almost exclusively "through the lens" of the forthcoming referendum on independence for Scotland. In other words, many approached the question of a UK Bill of Rights by asking whether such an instrument, or even a process for its adoption, would strengthen or weaken the case for independence in Scotland, and therefore the Union. Some questioned the legitimacy of the Commission on the basis that it had been appointed by the UK Government which did not have a mandate in respect of Scotland.

9.15 For its part, the Scottish Government said in its response to the Commission's Discussion Paper that "Scotland should be an independent nation, and that human rights would be secured under a Scottish constitution."

9.16 Against that background, the Commission was urged by many in Scotland to consider carefully the potential political and constitutional implications in Scotland of any recommendations for a UK Bill of Rights.

9.17 Only a small number of respondents in Scotland said that a UK Bill of Rights was necessary. Of those who did, their reasoning was generally that it was necessary as part of a written constitution and/or because it might address perceived deficiencies in the Human Rights Act. So again the concern was to prevent any reduction of rights but only to consider change if it meant an enriching of the current protections.

9.18 The clear majority view amongst those we met, however, was that there was no need for a UK Bill of Rights, and/or that the current system was working well and should be retained.

[263]The Commission's visit to Scotland took place prior to the agreement between the UK Government and Scottish Government on the basis for the independence referendum.

9.19 In discussion of possible additional rights for inclusion in any possible UK instrument, a number of those with whom we spoke drew the Commission's attention to the distinctive legal jurisdiction north of the border.

9.20 There were mixed feelings about creating a basic shared Bill of Rights across the UK with different sections or additions to reflect those differences with the argument made that the Scots were already tired of being seen as an add-on. One submission to the Commission from Scotland, however, referred (without further elaboration) to such a model for a UK Bill of Rights as one which the current devolution arrangements might support. Others were concerned about the complexity it might entail.

Wales

9.21 In Wales, the great majority of respondents and those we met expressed satisfaction with the Human Rights Act and the European Convention system, and either opposed the creation of a UK Bill of Rights or did not consider it to be necessary or desirable. Even those who supported the creation of additional rights generally wished to preserve the rights conferred by the Human Rights Act and did not express any opposition to the Human Rights Act. The First Minister said that "it was not clear what [a UK Bill of Rights] would add to the HRA," and others echoed his suggestion that the motivation for a UK Bill of Rights emanated from England and did not extend to Wales. In their response to our Consultation Paper the Counsel General and the First Minister on behalf of the Welsh Government said: "the Welsh Government finds it difficult to see the benefits in a UK Bill of Rights."[264]

9.22 In general, there was satisfaction with the Human Rights Act and the current system of rights protection developed by the Welsh Government and Assembly within its devolved competence under the Government of Wales Act 2006. This included legislation such as the Welsh Language (Wales) Measure 2011 and the Rights of Children and Young Persons (Wales) Measure 2011. As a result, it was suggested that these and other policy areas were now a matter for the devolved institutions in Wales and not issues which should figure in any discussion on a UK Bill of Rights. Concern was also expressed that if a UK Bill of Rights contained justiciable provisions that touched on devolved areas of competence, such as language, they could disturb the delicate balancing which had been achieved in Wales through instruments such as the Welsh Language Measure. The 2011 Measure is complex, extending to 157 sections together with twelve Schedules. It was the outcome of a great deal of political debate and discussion and reflects compromises which have been reached through the democratic process.

[264]Consultation Paper Response, p. 1.

9.23 Other rights were raised as being of specific concern in Wales. Since 2004, the Welsh Government has formally adopted the United Nations Convention on the Rights of the Child[265] as the basis of its policy-making and legislation for children and young people, and in November 2009 it launched a 5-year action plan for fuller implementation of the UNCRC in Wales. More recently, the National Assembly for Wales passed legislation that places a duty on Welsh Ministers to have "due regard" to the rights and obligations contained in the UNCRC in the exercise of any of their functions.[266] However, no special provisions relating to Wales would be needed in a UK Bill of Rights in order to enable Wales to continue to place specific emphasis on the rights of children and young persons under the UNCRC in this way. Indeed it was asserted that in many respects the Welsh Assembly now had the competence to introduce "uniquely Welsh policy approaches," such as those outlined above.

[265]For a description of the main provisions of the Convention, see chapter 4.
[266]The Rights of Children and Young Persons (Wales) Measure 2011.

Chapter 10: Promoting a Better Understanding of the UK's Obligations under the Convention

10.1 Our terms of reference called on us to consider ways "to promote a better understanding of the true scope" of the UK's obligations and liberties under the European Convention on Human Rights. While fewer than 20 respondents to our consultations made submissions to us about this aspect of our terms of reference, those who did tended to interpret it as a call for consideration of ways to cultivate a better understanding and sense of ownership of the rights set out in the European Convention and in the Human Rights Act. For example, the National Aids Trust wrote:

> "there is a need for Government (and other relevant parties including the Equality and Human Rights Commission) to engage in sustained work to educate the public with a view to clarifying understanding of human rights and the HRA. The public needs access to sources of accurate, unbiased information about the HRA to balance the myths perpetrated by some media outlets. NAT believe it is of vital importance that the Commission 'consider ways to promote a better understanding of the true scope of these obligations and liberties' as set out in its Terms of Reference."[267]

10.2 In addition, approximately 100 other respondents, as well as a number of organisations that we met in the course of our work, while not specifically citing this part of our terms of reference, also made similar calls for better public education to correct misperceptions about the Human Rights Act and the Convention.

10.3 More than half of these respondents advocated more educational programmes, both for UK society generally and schoolchildren, and in a number of cases argued the need for access to sources of accurate, unbiased information to balance what they believed to be the myths surrounding the Human Rights Act.

10.4 A small number of respondents were clear that a public education programme, rather than a UK Bill of Rights, would help dispel myths and correct misperceptions, while a similar number were clear that a UK Bill of Rights was needed, together with an education programme. These contrasting views can be seen in the submissions we received from the Howard League for Penal Reform who told us that:

> "we recommend the Commission advise the Government to undertake an appropriate and effective programme of public education on human

[267] National Aids Trust, Discussion Paper Response, p. 5.

> rights and the HRA, rather than changing the legislative basis of the way rights are currently protected in the UK. Such an approach would tackle the propagation of some of the myths that have grown up regarding the effectiveness of the HRA."[268]

10.5 Some of the students at the Northumbria University School of Law argued for a UK Bill of Rights partly on the grounds that:

> "the Bill would be an opportunity to educate and inform citizens of their rights. The student body concluded that any Bill of Rights which attempts to modify the UK's human rights' culture would have to do so through education. The introduction of a new Bill of Rights alone is highly unlikely to change public opinion on human rights. The media is likely to report in the same way, and therefore incorporating a proposal to educate as part of a proposal to create a Bill of Rights is key."[269]

10.6 For our own part, we consider that the major contribution which we can make to this aspect of our terms of reference is our report itself, together with its annexes and the detailed responses to our consultations, which are available on the Commission's website. In drafting the report we have been conscious of the need to make it as accessible as possible. We hope that anyone reading the report, who is not already expert in the subject matter which it covers, will at the very least gain a better understanding of the historical background and of the issues and arguments that give rise to a wide range of different views today. We have sought, in particular, to set out the background and history to where matters currently stand in as objective, accurate and accessible a fashion as possible. In addition we have sought to address the key question posed in our terms of reference of whether to create a UK Bill of Rights in a way which gives expression to the full range and richness of the arguments. We hope in particular that readers will gain a clear sense that the subject of a UK Bill of Rights is one that cannot easily be considered in isolation from other important issues of the day, including the relationship between the individual and the State, between Westminster and the devolved authorities, and between our national law and our international obligations. In addressing these issues we have benefited from a great number of thoughtful and extremely well argued submissions made to our Commission, and we have sought to draw as widely as we can from this material.

10.7 That said, we recognise that a report such as this is not likely to have immediate effects on the level of knowledge and understanding of the issues we touch upon, or to alter fundamentally the terms of the current public debate. That is in part because it is simply a fact of life that the portrayal and reporting of the issues at stake, on all sides of the argument, are often conveyed in polemical and sometimes inaccurate

[268] Howard League for Penal Reform, Consultation Paper Response, p. 2.
[269] Northumbria University School of Law (Student Response), Discussion Paper Response, p. 2.

terms. Much though we would prefer this not to be the case – and however much we have sought to avoid reflecting this in our own report – we feel that this is unlikely to change. But it is also in part because people – again on all sides of the argument – care passionately about the underlying issues and hold, at times, very differing views about them. That is why we have tried to address ourselves in our report fundamentally to the central issues – rather than to their portrayal and reporting – in a manner that is intended to contribute to the understanding of the complexities and the range of options that might be available for addressing them.

Chapter 11: Further Reform of the European Court of Human Rights

11.1 In the preceding chapters we discussed our investigation of a UK Bill of Rights for the United Kingdom, as called for by our terms of reference. Our terms of reference also require us to provide advice to the Government on reform of the European Court of Human Rights.

11.2 As we discussed in chapter 5, the European Court of Human Rights monitors and enforces the implementation of the European Convention on Human Rights by the 47 signatory states, including the United Kingdom. The Court has for some time been facing serious challenges in addressing its backlog of cases, which now stands at 140,000. There have also been a number of criticisms of aspects of the structure and functioning of the Court.

11.3 Accordingly, the 47 Member States of the Council of Europe have agreed a number of reform measures in recent years, and in February 2010 agreed a Declaration in Interlaken setting out a number of specific and substantial reform measures. This Declaration was agreed under the Swiss Chairmanship of the Council of Europe, and in November 2011, the UK Government was due to assume its six-month rotation of the Chairmanship. One of the UK's stated aims of the Chairmanship was to progress the Interlaken reform process.

11.4 In March 2011 when this Commission was established, the UK Government was eight months away from assuming this Chairmanship. The Government asked the Commission in its terms of reference to provide it with advice on the ongoing Interlaken process both ahead of and following its Chairmanship of the Council of Europe.

11.5 Accordingly, in September 2011, the Commission published its interim advice to the Government on reform of the Strasbourg Court. It also published at the same time a letter to Ministers which outlined other areas for potential reform which had either been raised with the Commission or by individual members of the Commission, but on which the Commission had not yet reached any conclusions.

11.6 In its interim advice, the Commission highlighted the serious challenges created by the Strasbourg Court's ever-growing caseload and urged the UK Government to vigorously pursue three areas of fundamental reform in order to achieve the well-being and effective functioning of the Strasbourg Court. These were:

- to pursue vigorously the need for a time-bound programme of urgent and fundamental reform, including the establishment of an enhanced screening mechanism and greater reliance on the principle of

subsidiarity,[270] in order to ensure that the European Court of Human Rights is called upon, as an international court, only to address a limited number of cases that raise serious questions affecting the interpretation or application of the Convention and serious issues of general importance;

- to question whether it is properly the function of an international court of last resort to be entrusted with the task of calculating and awarding just satisfaction by reconsidering the meaning and effect of Article 41 of the Convention and the role of the Court in awarding damages for 'just satisfaction'; and
- to enhance the procedures for the nomination and appointment of judges of the Court in order to ensure that the Court is composed of persons of sufficient standing and authority to command the full respect of national judges.

11.7 The Commission called on the UK Government to seek agreement amongst Members of the Council of Europe to allow the Court to focus on its essential purpose and, concomitantly, for Member States and their national institutions to assume their primary responsibility for securing Convention rights and providing effective remedies for violations.

11.8 In the letter submitted in parallel to the interim advice, the Commission highlighted other areas of potential reform for consideration, which it had not yet discussed in detail or agreed, including other possible measures to address the Court's backlog and measures to address the respective roles of the Court and the democratic institutions of the Council of Europe.

11.9 At the time when the Commission's advice was published, the UK Government stated that it would use the advice to inform its plans for the Chairmanship.[271] The UK Chairmanship culminated in the High Level Conference on the Future of the European Court of Human Rights in Brighton in April 2012 and the subsequent adoption of the Brighton Declaration.[272]

11.10 The Brighton Declaration called for:

- the Court to be able to concentrate on the most serious violations of human rights by amending the Convention to include the principle of

[270]The Strasbourg Court and other systems of protection at the Strasbourg level are intended to be subsidiary to the national systems of the 47 Member States in the protection and implementation of the Convention rights. In other words, it is the national authorities that have primary responsibility for implementing the Convention, with the Court playing a subsidiary role only.
[271]HC Deb, 8 September 2011, col. 28WS.
[272]Text available at: http://hub.coe.int/20120419-brighton-declaration.

subsidiarity, as well as that of the margin of appreciation, with the aim also of preventing the Court from accruing such a backlog of cases; and

- the Convention to be amended to tighten the admissibility criteria, to achieve the same aims so that cases considered trivial could be thrown out allowing the Court to focus on the most serious violations; and
- for the continued refinement of the process for the selection of judges to the Court.

11.11 In addition the Declaration also called for the reduction of the time limit for applications (from the exhaustion of domestic remedies) from six months to four; and set out a roadmap for further reform of the Court, in particular inviting the Committee of Ministers to give an interim view in 2015 on progress of the reform of the Court.

11.12 The Commission notes the reforms set out by the Brighton Declaration and the progress that has been made by the Court in addressing its backlog of cases using a number of the reform measures agreed earlier in the Court's reform process. For example, the Court has been making use of the single-judge mechanism to facilitate decision-making on a number of cases; and it has been making greater use of the 'no significant disadvantage' admissibility criterion to filter more cases from the Court's docket. These and other measures are reflected in the last set of annual statistics published by the Court which showed that there had been a 5% decrease of pending applications from the height of the backlog in August 2011 by the end of that year.

11.13 However, the Commission continues to believe that far more fundamental reforms, of the kind set out in its interim advice, are clearly required if the well-being of the Court is to be re-established. The Commission urges the Government, the successor Chairs to the UK[273] and the other Member States of the Council of Europe to continue to press for the fundamental reforms set out in its interim advice. In addition, one member of the Commission, Anthony Speaight QC has set out further views on possible reforms in a paper in this report.

[273]Andorra (November 2012 - May 2013); Armenia (May 2013 - November 2013); Austria (November 2013 - May 2014); Azerbaijan (May 2014 - November 2014); and Belgium (November 2014 - May 2015).

Chapter 12: Conclusions

The principal conclusions of this report are as set out below. The conclusions are unanimous other than where noted.

12.1 We are united in believing that there needs to be respect for the existence of differing intellectually coherent and valid viewpoints in relation to the human rights debate, and that the debate needs to be well informed and not distorted by the stereotypes and caricatures which have all too often characterised that debate in recent years (Our Approach to Our Work, paragraph 8).

Conclusions on the principle of a UK Bill of Rights

12.2 None of us considers that the idea of a UK Bill of Rights in principle should be finally rejected at this stage. We all consider that, at the least, it is an idea of potential value which deserves further exploration at an appropriate time and in an appropriate way (Overview, paragraph 67).

12.3 Any future debate on a UK Bill of Rights must be acutely sensitive to issues of devolution and, in the case of Scotland, to possible independence, and it must involve the devolved administrations (Overview, paragraph 73).

12.4 We are also acutely conscious of the sensitivities attached to discussion of a UK Bill of Rights in the context of Northern Ireland. In particular we recognise the distinctive Northern Ireland Bill of Rights process and its importance to the peace process in Northern Ireland. We do not wish to interfere in that process in any way nor for any of the conclusions that we reach to be interpreted or used in such a way as to interfere in, or delay, the Northern Ireland Bill of Rights process (Overview, paragraph 75).

12.5 We also recognise that any process of moving towards the creation of a UK Bill of Rights would have to be undertaken gradually, with full consultation, and with great care to avoid creating divisiveness and disharmony. To come to pass successfully a UK Bill of Rights would have to respect the different political and legal traditions within all of the countries of the UK, and to command public confidence beyond party politics and ideology. It would also, as a technical matter, involve reconsideration of the scheme of the devolution Acts, which limit the powers of the devolved legislatures and governments expressly by reference to respect for 'Convention rights' (Overview, paragraph 76).

12.6 Whatever the outcome of the independence referendum in Scotland, it seems likely that there will subsequently be proposals for changes in the relationship of the nations that will then comprise the United Kingdom be that within a Constitutional Convention, as the Prime Minister has suggested, or in some other forum. Such a forum would be

the most desirable place to consider the promotion of a UK Bill of Rights within the context of a wider constitutional review (Overview, paragraph 77).

The conclusions of the majority of members

12.7 A majority of the members of the Commission, including the Chair, believe that, on balance, there is a strong argument in favour of a UK Bill of Rights. Those members holding this view[274] note that the other 46 signatory states to the European Convention on Human Rights generally have their own written constitution, their own national bill of rights written in their own words or both. Indeed the UK is either alone or in a very small minority in not being in this position. In the view of these members, this would not greatly matter if there were widespread public acceptance of the legitimacy of our current human rights structures, including of the roles of the Convention and the European Court of Human Rights. But they believe there is not. It is this lack of 'ownership' by the public which is, in their view, the most powerful argument for a new constitutional instrument (Overview, paragraphs 78-80).

12.8 All of us believe that there is a role for better public education and understanding of the present human rights structures and their effect – indeed we hope that our own report will be a contribution to that – but the majority of members find it hard to persuade themselves that public perceptions are likely to change in any substantial way as a result, particularly given the highly polemical way in which these issues tend to be presented by both some commentators and some sections of the media. It follows that most members believe that more of the same is likely to lead simply to more of the same; a highly polarised division of views between those for and against our current human rights structures (Overview, paragraph 82).

12.9 A majority of members believe that the present position is unlikely to be a stable one. Some of the voices both for and against the current structures are now so strident, and public debate so polarised, that there is a strong argument for a fresh beginning. The conclusion of a majority of the Commission's members is accordingly that the case has been made out in principle for a UK Bill of Rights protecting everyone within the jurisdiction of the UK. In accordance with the Commission's terms of reference this conclusion is put forward on the basis that such a Bill would incorporate and build on all of the UK's obligations under the European Convention on Human Rights. However, the wider constitutional and political dimension is also of crucial significance in considering the way forward towards the introduction of a Bill of Rights, and it is essential that it provides no less protection than is contained in the Human Rights Act and the devolution settlements, although some of us believe that it could usefully

[274]David Edward, Edward Faulks, Jonathan Fisher, Martin Howe, Anthony Lester, Leigh Lewis and Anthony Speaight. Two members of the Commission – Helena Kennedy and Philippe Sands – do not share this view. Their views are set out in paras. 12.12 - 12.16 below.

define more clearly the scope of some rights and adjust the balance between different rights (Overview, paragraph 84).

12.10 In the view of the majority of members, an important further reason (and for some of them a particularly compelling reason) in favour of such a Bill is that it would offer the opportunity to provide greater protection against the possible abuse of power by the state and its agents. In the final analysis, in the view of these members, decisions on the extent of the powers of the state must be for Parliament. But they believe that the experience to date of the Human Rights Act is that a statute expressly protecting basic rights and freedoms can provide a valuable safeguard against any such abuse of power (Overview, paragraph 85).

12.11 The majority are agreed that such a Bill should have at its core the rights currently in the European Convention on Human Rights including those Protocols which the United Kingdom has accepted. That does not necessarily mean, however, that they would have to be written in identical language. On the contrary given that for the members concerned the key argument is the need to create greater public ownership of a UK Bill of Rights than currently attaches to the Human Rights Act it would clearly be desirable in principle if such a Bill was written in language which reflected the distinctive history and heritage of the countries within the United Kingdom (Overview, paragraph 86).

The conclusions of the minority of members

12.12 A minority of members believe that the moment is not ripe for the conclusion that a future process should be focused on a new UK Bill of Rights, not least since they believe that the majority has failed to identify or declare any shortcomings in the Human Rights Act or its application by our courts. They consider that it would be preferable to leave open the possibility of a number of options that, without prioritisation, could be addressed by a future Constitutional Convention. These include maintaining the status quo, adopting a new and free-standing Bill of Rights, or moving to new constitutional arrangements that would incorporate and build upon the rights protected by the Human Rights Act (Overview, paragraph 88(ii)).

12.13 These members base this view on three factors. The first factor is devolution. Noting that, since the Commission was established, a date has been set for a referendum on Scottish independence, an event the outcome of which could have significant consequences for the whole of the United Kingdom, and that, even without this event, there are calls for greater autonomy as the UK moves incrementally towards a federal structure, these members are greatly concerned that a premature move to a UK Bill of Rights would be contentious and possibly even dangerous, with unintended consequences, and that some members of the Commission have failed to acknowledge the full implications of the relationship between a possible UK Bill of Rights and the United Kingdom's other constitutional arrangements. They believe that

any Bill of Rights – and any proposals – would have to reflect the changing allocation of powers in the reconfiguration of the United Kingdom (Overview, paragraph 88(iv)).

12.14 The second factor relates to the views expressed in the Commission's consultations and work programme. These members note that their views are aligned with the views of respondents to the Commission's consultations, as this report recognises, in the sense of overwhelming support to retain the system established by the Human Rights Act (and very considerable opposition, for now at least, to the idea of a UK Bill of Rights). Moreover, it is abundantly clear in the view of these members that there is no 'ownership' issue in Northern Ireland, Wales and Scotland (or large parts of England), where the existing arrangements under the Human Rights Act and the European Convention on Human Rights are not merely tolerated but strongly supported (Overview, paragraph 88(v)).

12.15 The third factor concerns the view expressed in the course of the Commission's deliberations by a number of their colleagues on the Commission, to the effect that they would like the United Kingdom to withdraw from the European Convention on Human Rights (though they accept, equally, that others in the majority would join with them in envisaging no circumstances in which they would support such a move). This has alerted these members to what they believe is the real possibility that some people support a UK Bill of Rights as a path towards withdrawal from the European Convention (Overview, paragraph 88(vi)).

12.16 Against this background, these members consider that the case for a UK Bill of Rights has not been made, and that the arguments put to the Commission against such a Bill remain more persuasive, at least for now. These members remain open to the idea of a UK Bill of Rights were they to be satisfied that it carried no risk of decoupling the UK from the Convention. Indeed, they fear that the single argument relied upon by the majority – the issue of public ownership of 'rights' – will be used to promote other aims, including the diminution of rights available to all people in our community, and a decoupling of the United Kingdom from the European Convention on Human Rights (Overview, paragraph 88(vii)).

Conclusions on related and other issues

12.17 While we do not believe that it would be right for our Commission to reach firm conclusions on whether, if there were to be a UK Bill of Rights, it should contain additional rights to those in the European Convention on Human Rights we would, however, want to set out some principles which we think should be taken into account in this respect as part of any wider debate on whether to create a UK Bill of Rights (Overview, paragraphs 90 and 91).

12.18 Firstly, we do not oppose the concept of additional rights in principle. It is now over half a century since the European Convention on Human Rights was drafted and

society has moved on very considerably in that period. If the Convention as a whole were being drafted from scratch today it would undoubtedly be a very different document from that which emerged in the early 1950s. So we think it entirely right that, were there to be a UK Bill of Rights, consideration should be given to whether it should contain rights in addition to those in the original Convention (Overview, paragraph 91).

12.19 Secondly, we believe that amongst the additional rights which might be most readily considered in that eventuality are those which relate to people's fundamental rights to be treated equally irrespective, for example, of their innate characteristics such as their gender or ethnic origin (Overview, paragraph 91).

12.20 Thirdly, in respect of socio-economic and environmental rights a majority of members believe that it is undesirable in principle to open up to decisions of the judiciary issues which, in their view, are better left, to elected legislatures (Overview, paragraph 91).

12.21 A minority of members believe that, as in other jurisdictions, socio-economic rights – for example in relation to health care and the environment – can in practice be drafted in such a way as to make them suitable for application by judges; these members note that the law in the United Kingdom and under the European Convention already recognises and gives practical effect to socio-economic rights, and this has not given rise to notable difficulties before the courts (Overview, paragraph 91).

12.22 Fourthly, while we believe strongly that there should be an irreducible core of rights available to everyone in the UK, we believe that it should be open to the devolved legislatures to legislate, within their devolved powers, for specific additional rights dealing with particular subject areas to be provided for in their jurisdictions if they so wished (Overview, paragraph 91).

12.23 We all believe that there are a number of rights relating to our civil and criminal justice system that have come under threat from short term political pressures under successive governments that we would like to see specifically included, and thus protected, if there were to be a UK Bill of Rights (Overview, paragraph 92).

12.24 While we believe that there may be scope for some specific changes to the Human Rights Act position in respect of the mechanisms of how any UK Bill of Rights might operate, for the most part we conclude, in line with the majority of respondents, that the mechanisms in any UK Bill of Rights should be broadly similar to those in the Human Rights Act (Overview, paragraph 95).

12.25 If there were to be a UK Bill of Rights, we are clear that it should contain a similar mechanism to the declaration of incompatibility found in section 4 of the current Human Rights Act which we think strikes a sensible balance between, on the one

hand, the ultimate sovereignty of the UK Parliament and, on the other, the duty of courts to declare and enforce the law. (Overview, paragraph 96).

12.26 We conclude that the growing prevalence of the outsourcing of once traditional publicly provided functions to private and third sector providers means that the current definition of a public authority within the Human Rights Act should be looked at again if a UK Bill of Rights were to be taken forward (Overview, paragraph 97).

12.27 In respect of responsibilities, our conclusion is that it is in the nature of human rights that they exist for all human beings equally without reference to whether they are 'deserving' or not and that they cannot be made directly contingent on the behaviour of the individuals concerned. We thus do not believe, if there were to be a UK Bill of Rights, that the rights it contained should be made conditional upon the exercise of responsibilities. We do believe, however, that the formulation to be found in a number of the existing Articles in the European Convention on Human Rights whereby the rights in question are subject to such exceptions as are necessary in a democratic society for, amongst other things, the protection of the rights and freedoms of others, is one which should be emphasised in any UK Bill of Rights. We also believe that a UK Bill of Rights, if there were to be such a Bill, should contain a jurisdiction for a court to award damages but that this course should be discretionary and that in reaching such decisions the courts should be directed to take into account the conduct of the applicant (Overview, paragraph 100).

12.28 We conclude that if there were to be a UK Bill of Rights a declaratory (but non-justiciable) provision within it should certainly be considered as a means of attaching importance in a key constitutional instrument to the mutual ties and obligations on which society depends and of assisting its broad acceptance (Overview, paragraph 101).

Reform of the European Court of Human Rights

12.29 We urge the UK Government to do everything possible to maintain the momentum of the Brighton Declaration and to continue to press for the fundamental reforms of the European Court of Human Rights called for in the Commission's interim advice (Overview, paragraph 109).

Individual Papers from Members

The following papers are individual contributions from members. They do not form part of the agreed conclusions of the report.

Unfinished Business

by Lord Faulks QC and Jonathan Fisher QC

Introduction

In the period since our appointment as members of the Commission on a Bill of Rights ("the Commission"), it has become increasingly clear that a key issue, if not the key issue, has not been adequately considered by the Commission and reflected in the terms of its report.

The issue concerns how the UK should respond to the judicially activist approach taken by the European Court of Human Rights ("the Court") in its interpretation and application of the European Convention on Human Rights ("the Convention") in the last 30 years.

There are a number of possibilities ranging from further reform of the Court's processes to withdrawal by the UK from the Court's jurisdiction. The latter option would necessitate withdrawal from the Convention or at the very least, renegotiation of the terms of the UK's membership.

Yet, as the Overview of the Commission's report makes clear, by virtue of its terms of reference, the Commission has been required to proceed on the assumption that the UK is to remain a member of the Convention.

This is regrettable because it has circumscribed the scope of the Commission's work. In consequence, the Commission leaves in its wake vitally important unfinished business.

The Commission

The Commission was established following a resolution debated in the House of Commons on the 10 February 2011 noting the ruling of the Court on the issue of prisoner voting, expressing the opinion that legislative decisions of this nature should be a matter for democratically elected lawmakers, and supporting the retention of the current ban on voting by convicted prisoners. The resolution was passed by a majority of 234 to 22 (HC Deb, 10 February 2011, col. 493).

Two critical factors underlie the desire in effect to defy the Court's ruling.

First, the Court's decision is seen by many as an unwarranted interference with the democratically expressed will of Parliament as set out in section 3 of the Representation of the People Act 1983, and therefore falling well within the margin of appreciation which should be accorded to a democratic national order governed by the Rule of Law.

Secondly, the ruling is widely regarded in some circles as an example of judicial creativity and activism, extending far beyond the Court's remit to interpret and apply the terms of the Convention, as set out in Article 32 of the Convention.

The resolution passed in the House of Commons presents a direct challenge to the legitimacy of the Court. The UK Government's refusal so far to implement the terms of the Court's decision has precipitated a crisis in the relationship between the UK and the Court which, at time of writing, is unresolved.

The crisis, if it continues, will place the UK in breach of its obligation to abide by the terms of an international treaty to which it is a signatory. By Article 46(1) of the Convention, the UK has undertaken to abide by the final judgment of the Court in any case to which it is a party.

This is an undesirable state of affairs and it can be resolved in one of three ways, either by the UK accepting the Court's ruling and introducing amending legislation on the issue of prisoner voting, or withdrawing from the Convention, or at the very least, renegotiating the terms of its membership.

In answer to a question on the 24 October 2012, the Prime Minister (Mr David Cameron) made clear that "prisoners are not getting the vote under this Government" (HC Deb, 24 October 2012, cols. 922-3). However the Government has now published a draft Bill with three options for Parliament to consider. Only one of these would deny prisoners the right to vote. Following pre-legislative scrutiny of the Bill by a Joint Committee, Parliament will be asked to reconsider its views. The question arises of what happens if those views do not change.

Broader concerns

The prisoner voting issue is far from being the only Court decision with which the UK has quarrelled, and criticisms of the Court's judicial activism abound.

Difficulties experienced by the UK in seeking to deport non-citizens found guilty of serious criminal activity, or whose presence is considered to be inimical to the public good, have been the subject of extensive hostile comment by senior politicians and the media (see for example, an article published in the Daily Telegraph, 23 April 2011, under the headline "Stop foreign criminals using family rights to dodge justice" and the Home Secretary's (Mrs Theresa May) speech to the Conservative Party Conference on 4 October 2011).

There is a growing volume of literature published in recent times which is critical of the judicially activist approach of the Court (Pinto-Duschinsky, "Bringing Rights Back Home", Policy Exchange, February 2011; Raab, "Strasbourg in the Dock", Civitas, April 2011; Fisher, "Rescuing Human Rights", Henry Jackson Society, March 2012).

The criticisms of the Court's judicial activism transcend concerns expressed by politicians and the media.

A number of highly respected senior Judges have voiced concerns and their views are not to be discarded lightly (Lord Hoffmann, "The Universality of Human Rights", Judicial Studies Board Annual lecture, 19 March 2009; Lord Scott, "Property Rights and the European Convention on Human Rights", delivered to the Property Bar Association, 19 November 2009; Baroness Hale, "Beanstalk or Living Instrument? How tall can the ECHR grow"?, Barnard's Inn Reading, 2011).

Whither the margin of appreciation?

Numerous examples of the Court's judicial activism could be cited.

Suffice it to record a recent egregious illustration of the Court's judicially creative encroachment on the UK's margin of appreciation in the case of *Redfearn v. United Kingdom* (No. 47335/06, HEJUD [2012] ECHR 1878 (6 November 2012)).

In this case, the Court held that the UK had violated Article 11 of the Convention (freedom of association) after the Court of Appeal (Civil Division) had upheld a decision by Serco Limited to dismiss the complainant from his employment as a driver in Bradford transporting disabled persons who were mostly Asian following his election as a local councillor for the British National Party.

The Convention recognises that the UK is not obliged under Article 11 to guarantee the effective enjoyment of the right to freedom of association absolutely. Nonetheless the Court concluded that the UK's legislation is deficient because, when establishing claims for unlawful discrimination, Parliament had declined to protect against discrimination on the grounds of political opinion or affiliation.

The former President of the Court, Sir Nicholas Bratza, delivered a dissenting opinion in the *Redfearn* case, along with two other judges. In their view, the Court was pressing "the positive obligation [in Article 11] too far." The decision made by Parliament not to give political affiliation equivalence with race, sex and religion as a ground requiring special protection against discrimination was neither random nor arbitrary. Rather, it was a decision made "[i]n a complex area of social and economic policy [which] it is in our view pre-eminently for Parliament to decide…" (Dissenting Opinion, paragraph 4).

Procedural issues

There is broad recognition that the Court has been unable to handle its cases in an efficient manner, leading to an extensive backlog of cases and unacceptable delays (see Lady Justice Arden, "Peaceful or Problematic? The Relationship between national Supreme Courts and Supranational Courts in Europe", Annual Sir Thomas More Lecture 2009, paragraph 59).

The quality of the Judges and the manner of their selection has been a subject of concern in some quarters, and the Court has failed to heed calls for reform on a number of occasions

(see Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, 27 September 2001; Report of the Group of Wise Persons to the Committee of Ministers, Meeting, 15 November 2006).

As at 30 October 2012, according to the Court's own statistics there are 135,350 pending applications.

Diminishing respect for human rights

In consequence, instead of enhancing respect for human rights in the UK, the incorporation of the Convention into domestic law by the Human Rights Act 1998, carrying with it what has been interpreted as an obligation by the UK Courts to apply the judicially creative jurisprudence of the Court, has served to undermine and diminish the cause of human rights in a corrosive and divisive manner.

Where a UK case has been decided by the Court, the UK courts have decided that they are effectively bound to follow the Court's decision. As the Lord Rodger of Earlsferry noted in *Secretary of State for the Home Department v. AF* [2009] UKHL 28 (at paragraph 98), "even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentoratum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed." This approach has been the subject of criticism, most notably by Lord Irvine of Lairg who has argued that the UK courts should be more robust in departing from Strasbourg cases and that their current degree of deference is not justified by the terms of section 2 of the Human Rights Act 1998, which merely states that the courts must "take into account" Strasbourg decisions ("A British Interpretation of Convention Rights", Bingham Centre for the Rule of Law/UCL Judicial Institute Lecture, 14 December 2011.) Despite such criticism and some signs of possible rethinking of their approach by the courts, it remains the case that the UK courts will continue to exercise a very high degree of deference to Strasbourg decisions even where they have doubts about the correctness of the Strasbourg Court's interpretations of the Convention.

The notion of human rights has been devalued in the eyes of the public, and perceptions of the UK's historical protection of fundamental freedoms and civil liberties have been degraded in the process.

When asked in a YouGov / ITV survey conducted on 23- 24 March 2011, 73% of participants thought the Human Rights Act 1998 was used too widely to create rights it was never intended to protect. 51% of participants believed that human rights laws were bad for British justice.

Moreover, in a YouGov / Sunday Times survey conducted on 29- 30 September 2011, 67% of participants expressed the view that the Court had too much power to intervene in British laws, with 73% of participants wanting to see the final ruling on human rights laws in the UK made by the Supreme Court and not the European Court of Human Rights.

In a YouGov / Sunday Times survey conducted a few weeks later, on 6- 7 October 2011, 68% of participants agreed with the proposition that the Home Secretary (Mrs Theresa May) was “essentially right about the way our courts are tilted too far towards the wrong people.”

Not much had changed by 19- 20 April 2012 when a further YouGov / Sunday Times survey asked whether the Court had too much power to intervene in British laws. 67% of participants agreed with the proposition. 73% of participants again indicated that they wanted the UK Supreme Court to make the final ruling on UK human rights laws.

The result of the YouGov survey conducted in April 2012 was reported in an article published by the Daily Mail on the 16 April 2012 under the headline “Human rights laws are a charter for criminals, say 75% of Britons.”

The hostile tenor of reporting in certain sections of the media continues unabated. For example, on 11 November 2012 the Mail on Sunday published four letters from readers regarding aspects of the Human Rights Act 1998 under the headline “These human rights are just a criminal’s charter.”

It is easy to dismiss such commentary as ill-informed or even xenophobic. However, the sheer accumulation of examples and the weight of adverse comments illustrate that the public perception of the impact of the Human Rights Act in the United Kingdom is substantial and evidence-based.

UK Bill of Rights

Meanwhile, as the Commission has recorded elsewhere in this report, there are real concerns about the need to safeguard fundamental freedoms and civil liberties in the UK for future generations.

During the last 25 years, there has been a succession of legislation passed by Parliament which has increased the powers of the police, prosecutors and the courts.

There was a period of time when the right to trial by jury in England was not secure in serious cases, and there has been an exponential increase in the imposition of administrative penalties. Challenges to privacy presented by the computer revolution abound, and there is on-going debate about the freedom of the media and regulation of the internet.

In these circumstances, there are cogent arguments in favour of the enactment of a UK Bill of Rights, building upon the tradition of Magna Carta and the Bill of Rights and the Claim of Right 1689, if the protection of fundamental freedoms and civil liberties is to be secured in the coming years.

Relationship between a UK Bill of Rights and the Court

The establishment of a domestic Bill of Rights would require, at the very least, amendment of the Human Rights Act 1998 since the Convention would no longer have status as the primary human rights instrument in UK law.

In this event, although withdrawal from the Convention does not necessarily follow and a UK Bill of Rights can certainly co-exist with the Convention in a similar way to the national charters of rights adopted in many other European countries, an informed debate needs to take place on the nature of the relationship between a domestic Bill of Rights and the continuing jurisdiction of the Court.

This is because the enactment of a domestic Bill of Rights would not engage one of the principal reasons for its establishment if the UK continues its adherence to the jurisprudence of the Court in its present form.

For this reason, it is artificial to explore the further development of human rights in the UK in a vacuum, without a consideration of the role which has been played by the Court and whether, if a domestic Bill of Rights is to be enacted, this role should continue in any shape or form.

The remote possibility of further Court reform

The problems posed by a judicially activist Court could be resolved if effective reforms were agreed and implemented by the Council of Europe.

The Commission's side letter, published with its interim advice on Court reform, contained suggestions from Commission members which included introducing a Statute of the Court to facilitate the development of effective Court procedure, some form of democratic override and subsidiarity reviews.

Other ideas include undertaking a country based human rights audit, perhaps using a scoring system, so that a wider margin of appreciation could be applied in cases involving countries with good human rights protections in place at the national level.

Greater involvement of domestic judges could be achieved by reconstituting the composition of the Grand Chamber of the Court. Judges from domestic Supreme Courts could sit in the Grand Chamber, perhaps on a rotation basis. This would improve dialogue between national judges and the full-time judges of the Court. It would also help restore public confidence in the decisions of the Court.

The Court could adopt a less judicially activist approach to the interpretation and application of the Convention. It is not unusual for the degree of judicial activism and creativity to ebb and flow in a high appellate court.

There are also strong arguments that the Court should take a more restrictive approach to the interpretation and application of the Convention in accordance with Articles 31 to 33 of the Vienna Convention (see Fisher, "Rescuing Human Rights", Henry Jackson Society, March 2012).

Unfortunately, the prospects for Court reform are extremely remote. The Court has failed to heed the calls made at Interlaken (February 2010) and Izmir (April 2011) for increased recognition of the role of subsidiarity in the interpretation and application of the Convention.

At a meeting of the Council of Europe held at Brighton (April 2012), the UK unsuccessfully sought to enhance the Court's recognition of the margin of appreciation by including a reference to the doctrine in the Convention text. Instead, the Council of Europe decided to amend the Convention by mentioning the margin of appreciation in the Preamble to the text. This is not a distinction without a difference and the centrality of the doctrine has been relegated as a result.

The unsatisfactory outcome of the Brighton meeting was predictable in the face of strong opposition from the Court to the inclusion of any reference to the margin of appreciation in the Convention text. Viewed from the perspective of the Court, the notion of embedding the doctrine of the margin of appreciation in the Convention text would be an anathema since it would restrict its judicially activist and creative tendencies.

Sir Nicholas Bratza made clear at the opening session that the Court was "uncomfortable with the idea that Governments can in some way dictate to the Court how its case-law should evolve or how it should carry out the judicial functions conferred on it" (High level Conference, Brighton 18- 20 April 2012, Address by Sir Nicolas Bratza, President of the European Court of Human Rights).

Emphasising the Court's opposition to the UK's suggestion, the President explained that the Court "[had] difficulty seeing the need for, or the wisdom of, attempting to legislate for it in the Convention, any more than for the many other tools of interpretation which have been developed by the Court in carrying out the judicial role entrusted to it."

Regrettably, the Court's objection missed the point the UK was seeking to make, since the doctrine of the margin of appreciation is not merely one of a number of tools of interpretation. Rather, it is a central principle in the architecture of the Convention which a Court exercising supra-national jurisdiction should be endeavouring to deploy in its interpretation and application of the Convention.

Renegotiation or withdrawal

In these circumstances, one possibility open for discussion is renegotiation of the terms of the UK's membership of the Convention, to allow the UK to remain a signatory to the Convention but with its domestic courts not subject to the Court's jurisdiction. Certainly the

domestic courts could take the Court's decisions into account, but they would be free to depart from them, even in a case in which the UK was a party to the decision.

Another possibility, if an acceptable renegotiation cannot be achieved, is consideration of whether the time has arrived for the UK to leave the Convention altogether.

These matters are integral to any examination of the best way for the UK to safeguard fundamental freedoms and civil liberties in the years to come, and it is regrettable that the Commission, through no fault of its own, has not had an opportunity to consider them.

Contemplating withdrawal from the Convention

Mindful of the Court's activist approach, there are strong arguments that the cause of human rights, both in the UK and internationally, would be better served by withdrawal from the Convention and the enactment of a domestic Bill of Rights, or at the very least a renegotiation of the UK's terms of membership so as to free it from the strictures of the Court.

There is no reason in principle or practice why the Supreme Court in the UK should not act as the final judicial arbiter on issues pertaining to the protection of fundamental freedoms and civil liberties.

Supreme Court Justices are drawn from a pool of highly experienced and competent lawyers immersed in the traditions of the jurisdictions from which they are drawn, with independence of spirit and astute minds. The role of final arbiter is adequately performed in other countries such as the United States, Canada, South Africa, Australia and New Zealand, without supervision from an international body similar to the European Court of Human Rights exercising supra-national jurisdiction of direct application.

Revisiting a "strike-down" power

National courts which are closely aligned with the common law tradition, have been afforded differing "strike down" powers enabling them to declare void a statute or statutory provision where it is considered to contravene their domestic Bill of Rights.

The question arises as to whether, if the UK was to withdraw from the Convention, it should retain the arrangement in the Human Rights Act 1998 under which the domestic courts are limited to issuing a declaration of incompatibility and not an order (known as a "strike down" power) which would declare Parliamentary legislation null and void.

A "strike down" power is controversial for a number of reasons, most significantly because it trumps the will of the majority expressed through the operation of a democratically elected Parliament.

However, a number of senior English Judges have recently placed on record the notion that this power is already embedded in the common law by operation of the fundamental principles underlying the Rule of Law (Lord Justice Laws, "Law & Democracy" [1995] PL 72; Lord Justice Sedley, "Human Rights; a Twenty First Century Agenda" [1995] PL 386; Lord Woolf, "Droit Public-English style" [1995] PL 57; Lord Hope in *Jackson v. Attorney General* [2006] 1 AC 262 at paragraph 107; Lord Steyn, "Democracy, the rule of law and the role of judges", [2006] EHRLR 243; Lord Justice Elias, Annual Lord Renton Lecture, Statute Law Society, 24 November 2009; Lord Phillips, interview with BBC News, 2 August 2010. See also Professor Bogdanor's Magna Carta Lecture, "The sovereignty of Parliament or the Rule of Law", 15 June 2006.)

The Courts in Scotland and Northern Ireland have already been afforded power to "strike down" legislation passed by the devolved assemblies if it is considered to contravene the European Convention on Human Rights, and in England the same power exists with regards to delegated legislation.

Experience in jurisdictions where domestic Courts have a "strike down" power suggests that a Supreme Court is more reluctant to exercise the power where it has immediate effect, than where a declaration of incompatibility is issued and the matter is referred back to a democratically elected Parliament for re-consideration.

The UK as a pariah state?

A full and frank discussion needs to take place to assess whether or not the UK would become, in the words of the Attorney General (Mr Dominic Grieve) a "pariah State" if the UK were to leave the Convention (Interview with the Daily Telegraph, 9 October 2012).

On the issue of foreign influence, it is difficult to see how the UK's withdrawal from the Convention would weaken the protection of fundamental freedoms and civil liberties in Europe and, more particularly, countries in the former Soviet bloc.

Whilst the Council of Europe may be able to identify improvements in the human rights records of some former Soviet bloc countries, the records of countries such as Russia and the Ukraine remains very poor. It is not defeatist but rather a statement of political reality to recognise that the UK's continuing membership of the Convention is not a matter which weighs heavily with these countries, or any others.

Meanwhile, it is axiomatic to record that the UK would continue to adhere to an ethical foreign policy and promote adherence to the safeguarding of fundamental freedoms and civil liberties at all times.

It is regrettable, therefore, that the Commission's terms of reference were drawn in a way which precluded the Commission from considering these critically important matters.

Unfinished business

As Mr Jack Straw, former Home Secretary and Secretary of State for Justice, said in the prisoner voting debate:

> "… the problem is not the plain text of the Convention, but the way in which it has been over-interpreted to extend the jurisdiction of the European Court… [T]he problem has arisen because of the judicial activism of the Court in Strasbourg, which is widening its role not only beyond anything anticipated in the founding treaties but beyond anything anticipated by the subsequent active consent of all the state parties, including the UK" (HC Deb, 10 February 2011, cols. 501-2).

These issues cannot, and should not, be ignored. The establishment of a domestic Bill of Rights is a significant step towards safeguarding fundamental freedoms and civil liberties in the UK, but it is not a panacea for all evils.

The Commission's work will make a valuable contribution to the continuing human rights narrative in the UK by recommending the principle of a domestic Bill of Rights. We wholeheartedly support the Commission's conclusion in this regard. But the recommendation, though highly significant, is a relatively narrow one. There is unfinished business which remains to be done.

A UK Bill of Rights

by Martin Howe QC

The main purpose of this draft is to illustrate a number of things which might be possible if the United Kingdom were to adopt a new Bill of Rights. First, it seeks to draw directly on the historical sources in our constitution of a number of fundamental rights which later became reflected in the European Convention, by including explicit references to Magna Carta and to the Bill of Rights and the Claim of Right of 1689.

Secondly, it seeks to weave the principles of some of the Convention rights more closely into our legal system than is possible in a Convention whose wording needs to cover many countries with many different legal systems. For example, Articles 2 to 4 deal separately with the rights which would apply to the four different types of proceedings under our law of civil claims, judicial review, criminal proceedings, and the ever growing category of non-criminal proceedings in which penalties are imposed.

Thirdly, it contains some extended or additional rights, such as jury trial, proof beyond reasonable doubt and the rule against self-incrimination; wider rights of openness of justice than are in the Convention; and rights relating to personal information held by the State which reflect the growth of information technology since the Convention was drafted in the 1950s.

Fourthly, it seeks to adjust the balance between different rights, for example by strengthening protection for freedom of expression and by explicitly acknowledge a right to self defence. Fifthly and probably most controversially, it seeks to define more clearly and closely the scope of some rights whose scope is only vaguely defined in the Convention.

Any draft text necessarily reflects policy choices as to what rights should or should not be put into a Bill of Rights, or as to how they should be extended or rebalanced. It is not for me or indeed for the Commission as a whole to make such policy choices, which are a matter for Parliament if it decides to proceed with a UK Bill of Rights. On the other hand, I think it is helpful to public understanding and debate to have an actual concrete text which makes it easier to understand the kinds of things which could be done, and how they could be done.

As is made clear elsewhere in the report, other members of the Commission have varying views about whether they agree with this draft or aspects of it, which they can express for themselves. I would like to express my gratitude to all my colleagues on the Commission for their comments and criticisms which have allowed me to improve the draft in a number of respects, even where those colleagues have strong objections to it. The remaining flaws and deficiencies in the draft are all mine.

Draft Articles	Explanatory Notes
Chapter 1: The Rule of Law	
Article 1: Reaffirmation of fundamental rights recognised in Magna Carta (25 Edw 1, Chapter 29) and in the Claim of Right Act 1689 (Article 10)	
1. No free person shall be detained or imprisoned, or be deprived of his freehold, or liberties, or free customs, or be outlawed, or exiled, or in any other way destroyed; nor will anyone be judged or condemned, but by lawful judgment of his or her equals, or by the law of the land. Justice or right shall not be sold, or denied or delayed, to any one.	This most famous provision from Magna Carta (1215) is at the front of the Bill of Rights for two reasons. First, it emphasises the very long historical roots of the protection of civil rights and freedoms in these islands, and invites the rights set out later in the Bill to be read and interpreted in the light of that history. Secondly, it is the constitutional foundation of the rule of law upon which other rights are based. The King, personifying the State, accepts that he is bound by the law of the land and that a citizen may not be punished except in accordance with the law. The second sentence enshrines the right of the citizen of access to the courts for the effective vindication of rights. In the original Latin text, the phrase “liber homo” has traditionally been translated into English as “free man”; but it is more accurate to translate “homo” as person (or human being). In Latin, the word for a man as opposed to a woman is “vir” rather than “homo”. This part of Magna Carta is still on the statute book and still forms part of the law in England and Wales. The effect of placing it in the Bill of Rights is to give it protection against implied repeal by later statutes, and explicitly to require that the principles which it contains are taken into account where later laws are measured against the Bill of Rights. As regards Northern Ireland, this provision of Magna Carta was mirrored in the Great Charter of Ireland issued by Henry III in 1216-17 and still forms part of statute law in Northern Ireland. (Indeed, it was explicitly retained as part of the law in the Irish Republic under the Statute Law Revision Act 2007 (Ireland), Sch 1. Part I.) As regards Wales, Llywelyn Fawr (Llywelyn the Great) participated along with the English barons in negotiating Magna Carta with King John, and its original 1215 version contained provisions for the restoration of Welshmen both in England and in Wales.

Draft Articles	Explanatory Notes
2.The imprisonment of persons without expressing the reason therefor and delaying to put them to trial is contrary to law.	The Claim of Right of 1689 (formally entitled the Claim of Right Act 1689 by the Statute Law Revision (Scotland) Act 1964) was adopted by the Parliament of Scotland in parallel with the adoption by the Parliament of England of the Bill of Rights of 1689. The Claim of Right formally reasserted a number of fundamental rights recognised by Scots law, upon acceptance of which William and Mary were declared to be King and Queen of Scotland. The right to freedom from imprisonment without trial expressed in the tenth Article opposite is the most closely analogous to Chapter 29 of Magna Carta, but the thirteenth Article is also fundamental to the administration of justice since it declares unlawful the sending of letters to courts of justice interfering with how they deal with cases before them.
Article 2: Access to fair and open justice	
1. Everyone has the right to have the existence or extent of a civil right or obligation, a charge of a criminal offence, or other proceedings which may lead to the imposition of a penalty, determined by a court.	
2. Everyone has the right to have a decision by a public authority which directly and substantially affects himself or herself, or the exercise or enjoyment of his or her rights or property, judicially reviewed by a court.	
3. A “court” shall mean an independent and impartial tribunal established by law, which shall act fairly, and shall conduct and conclude its proceedings without unreasonable delay.	

Draft Articles	Explanatory Notes
4. A court shall conduct its proceedings and pronounce its judgment in public. Where proceedings are conducted in part or in whole in written form or a written judgment is issued, the written documents or judgment shall be made available to the public substantially contemporaneously. Everyone shall be free to disseminate the contents of the judgment and what has transpired in the proceedings.	
5. Restrictions may be imposed on the access of the public to the proceedings of a court or on the right of persons with access to those proceedings to disseminate information, to the extent strictly necessary:-	
(a) where a court decides that publicity would defeat the interests of justice;	This limited exception to open justice at common law was recognised under English law in the case of *Scott v. Scott* [1913] AC 417 as being limited to cases in which publicity would defeat the purpose of the proceedings.
(b) in other cases provided by or under statute in the interests of national security, the interests of juveniles or the protection of the private life of the parties or other persons involved, where such restrictions are compatible with a democratic society.	
6. Anybody, including a member of the media, shall have the right to apply to the	

Draft Articles	Explanatory Notes
court to challenge the justification for such restrictions in a particular case.	
Article 3: Safeguards in criminal cases	
1. Everyone charged with a criminal offence has the following rights:	
(a) to be presumed innocent until proved guilty according to law;	Sub-paras (a) to (f) are the same as ECHR Arts 6.2 and 6.3(a) to (e).
(b) to be informed promptly, in a language which he or she understands and in detail, of the nature and cause of the accusation against him or her;	
(c) to have adequate time and facilities for the preparation of his or her defence;	
(d) to defend himself or herself in person or through legal assistance of his or her own choosing or, if without sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; and to communicate privately with his or her legal adviser for the purpose of such defence;	
(e) to examine or have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;	

Draft Articles	Explanatory Notes
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;	
(g) to have disclosed evidence in the possession of the prosecuting authorities which tends to exculpate or mitigate, except where that evidence is withheld by a decision of the court made on compelling grounds of public interest and where the fairness of the proceedings is not thereby prejudiced;	Sub paras (g) and (h) reflect common law principles which are also reflected in Strasbourg jurisprudence.
(h) not to be compelled to give evidence against himself of herself, but this shall not prevent the court from drawing adverse inferences where justified.	As to (h), see *Saunders v. United Kingdom* (1997) 23 EHHR 557.
2. Subject to exceptions relating to matters specially within the knowledge of the accused, the burden of proving the facts which establish a criminal charge shall rest upon the prosecution and the guilt of the accused must be proved beyond reasonable doubt.	This reflects the common law, and goes beyond the requirements of the Convention.
3. Everyone has the right to have a serious criminal charge against him or her determined by a jury, except where a fair trial by jury cannot be guaranteed because there is a grave risk of intimidation of or interference with jurors. In England, Wales and Northern Ireland, a serious criminal	

Draft Articles	Explanatory Notes
charge shall be a charge with a maximum sentence of imprisonment of 12 months or more, and in Scotland it shall be a charge tried on indictment.	
4. Article 11 of the Bill of Rights 1689 (that jurors ought to be duly empanelled and returned) is reaffirmed.	
5. Paragraph 3 does not extend to the trial by court martial of members of the armed forces and other persons subject to armed forces jurisdiction.	
6. In this Article, a "criminal offence" shall mean an offence so described under the law of a part of the United Kingdom. No penalty of imprisonment, or compulsory work or other serious restriction on personal liberty, shall be imposed as punishment except upon conviction for a criminal offence.	This definition is intended to distinguish prosecutions for criminal offences from other proceedings in which penalties are imposed, to which the safeguards in the next Article will apply.
Article 4: Fines and other penalties	
There are numerous and growing instances where penalties, fines or forfeitures are imposed by administrative bodies. Some of these are of long standing, such as tax penalties imposed by HMRC, or Customs seizure of cars used to smuggle goods. More recently, regulatory bodies such as the FSA or utility regulators have acquired powers to impose fines or other penalty payments. This is not objectionable provided that the citizen continues to enjoy the right to challenge the penalty in proceedings in which the onus is on the State to justify its imposition. Where a penalty is imposed by a body which is not impartial (i.e. it does not satisfy the requirements of being an independent and impartial court or tribunal), an appeal in which the onus lies on the citizen to reverse the decision is not satisfactory.	

Draft Articles	Explanatory Notes
1. The first part of Article 10 of the Bill of Rights 1689 (declaring that excessive bail should not be required nor excessive fines be imposed) and Article 12 (declaring fines and forfeitures before conviction to be contrary to law) are reaffirmed.	This and the next paragraph emphasise the historical continuity of these protections under the law of the different parts of the United Kingdom.
2. Article 9 of the Claim of Right 1689 (declaring to be contrary to law the imposition of extraordinary fines, the exacting of exorbitant bail, and fines and forfeitures before sentence) is reaffirmed.	
3. Where a penalty is imposed otherwise than by a court as defined in Article 2, the person upon whom the penalty is imposed has the right to require that the decision to impose the penalty shall be reconsidered de novo by a court in proceedings in which the burden of proving the conduct which merits the penalty shall rest upon the person or authority which seeks to uphold its imposition.	The purpose of this Article is to overcome the present rather unsatisfactory state of affairs where under the Strasbourg Court's jurisprudence some proceedings for a penalty which are classed as non-criminal under domestic law are classed as "criminal" under Article 6 ECHR and attract the full range of safeguards in Article 6.2, but others are merely civil. This Article identifies an intermediate category of proceedings for imposition of a penalty which are not criminal proceedings under UK law and provides for safeguards which are appropriate for such proceedings.
4. In proceedings for a penalty otherwise than by way of a charge of a criminal offence, the safeguards in Article 3.1(b), (c), (d) and (f) shall apply.	The Article as present drafted does not define "penalty". It obviously includes a fine or a forfeiture of property. The suspension or withdrawal of the right to carry on a trade or profession which is imposed for disciplinary reasons would also normally be regarded as a penalty but not a suspension for precautionary reasons because e.g. a health practitioner represents a danger to the public. This distinction could be made the subject of a more explicit definition.

Draft Articles	Explanatory Notes
Article 5: Double jeopardy	
Nobody shall be tried again for an offence of which he or she has been acquitted, unless that acquittal is set aside because of a defect in the proceedings leading to it, or unless new and important evidence is found which could not have been found by the prosecution with reasonable diligence at the time of the first trial.	The qualification reflects the present law under which compelling new evidence (e.g. DNA evidence) can lead to the re-opening of a previous acquittal. It would safeguard against further erosion of the rule against double jeopardy. It is stricter than ECHR Protocol 7 Article 4 which would permit a retrial "if there is evidence of new or newly discovered facts."
Article 6: No punishment without law	
1. No one shall be held guilty of any criminal offence, or have a penalty imposed, on account of any act or omission which did not constitute a criminal offence or give rise to liability for the penalty under the law of the United Kingdom at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed or the conduct occurred.	This reflects Article 7 ECHR which prohibits retrospective punishments for acts which were not contrary to the law when committed. It extends its principles also to non-criminal proceedings for the imposition of a penalty.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal under international law or according to the general principles of law recognised by civilised nations.	

Draft Articles	Explanatory Notes
Chapter 2: Life and Liberty	
Article 7: Right to life	
1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally.	This closely follows Article 2 ECHR.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is reasonably necessary:	One omission from Article 2 ECHR is any explicit reference to war. This could be rectified.
(a) in defence of any person from unlawful violence;	
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;	
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.	
3. Deaths resulting from lawful acts of war shall not be regarded as contravening this Article.	This reflects the circumstances in which a State may derogate from Article 2 ECHR on account of war under Article 15.2 ECHR.
Article 8: Prohibition of torture	
1. The second part of Article 10 of the Bill Rights 1689 (which prohibits the infliction of cruel and unusual punishments) is reaffirmed.	Article 10 of the Bill of Rights 1689 was copied verbatim into the Eighth Amendment to the US Constitution and has given rise to extensive judicial interpretation there. Analogous provisions in Commonwealth constitutions have also given rise to judicial interpretations.
2. No one shall be subjected to torture or to any cruel, inhuman or degrading treatment or punishment.	This reflects Article 3 ECHR.

Draft Articles	Explanatory Notes
Article 9: Prohibition of slavery and forced labour	
1. No one shall be held in slavery or servitude.	This is the same in substance as Article 8 ECHR save for the minor changes noted.
2. No one shall be required to perform forced or compulsory labour.	
3. For the purpose of this Article the term “forced or compulsory labour” shall not include:	
(a) any work required to be done in the ordinary course of lawful detention or during conditional release from such detention, or under the sentence of a court as punishment for a criminal offence;	This sub-para now explicitly recognises the right to impose non-custodial sentences of unpaid work (formerly Community service) independently of prison sentences.
(b) any service of a military character or, in case of conscientious objectors, service exacted instead of compulsory military service;	
(c) any service required in case of an emergency or calamity threatening the life or well-being of the community;	
(d) any work or service which forms part of normal civic obligations;	
(e) any work (including training) required to be performed as a condition of receiving a benefit or payment.	Sub-para (e) has been added for the purpose of clarification.

Draft Articles	Explanatory Notes
Article 10: Right to liberty and security The drafting of this Article closely follows that of Article 5 ECHR.	
1. Everyone has the right to liberty and security of person. No one shall be deprived of his or her liberty save in the following cases and in accordance with a procedure prescribed by law:	
(a) the lawful detention of a person after conviction by a competent court;	
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;	
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his or her committing an offence or fleeing after having done so;	
(d) the detention of a minor by lawful order for the purpose of educational supervision or his or her lawful detention for the purpose of bringing him or her before the competent legal authority;	
(e) the lawful detention of persons for the prevention of	The ECHR language of “unsound mind” has been updated to “mentally ill”. The word “vagrant” may also

Draft Articles	Explanatory Notes
the spreading of infectious diseases, of persons who are mentally ill, alcoholics or drug addicts or vagrants;	need revision in a modern statute.
(f) the lawful arrest or detention of a person to prevent his or her effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.	
2.Everyone who is arrested shall be informed promptly, in a language which he or she understands, of the reasons for the arrest and of any charge against him or her.	The principle in para 2 was firmly established as part of common law by the House of Lords in *Christie v. Leachinsky* [1947] AC 573. Viscount Simon said: "No one, I think, would approve a situation in which when the person arrested asked for the reason, the policeman replied 'that has nothing to do with you: come along with me.' Such a situation may be tolerated under other systems of law, as for instance in the time of lettres de cachet in the eighteenth century in France, or in more recent days when the Gestapo swept people off to confinement under an over-riding authority which the executive in this country happily does not in ordinary times possess. This would be quite contrary to our conceptions of individual liberty."
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial, subject to Articles 4.1 or 4.2 above	

Draft Articles	Explanatory Notes
(prohibitions on excessive or exorbitant bail).	
4. Everyone who is deprived of his or her liberty by arrest or detention shall be entitled take proceedings (by application for a writ of *habeas corpus* or other effective procedure) by which the lawfulness of his or her detention shall be decided speedily by a court and his or her release ordered if the detention is not lawful.	Although a procedural remedy, habeas corpus has been of profound practical importance ever since the Habeas Corpus Act 1679 gave it effective teeth.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.	
Article 11: Removal from the United Kingdom	
1. Nobody shall be expelled, returned or extradited to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.	This reflects the wording of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) to which the United Kingdom is a party. The European Convention contains no explicit asylum right since the rights of asylum seekers were dealt with in the Geneva Refugees Convention. However an implicit asylum right has been developed under the European Convention in the jurisprudence of the Strasbourg Court in *Chahal* and subsequent cases. This is mainly focussed on the risk of torture or other ill-treatment contrary to Article 3 ECHR but has more recently been extended to cover some cases where there is a risk of an individual being exposed to an unfair trial. The logic of these cases in the Strasbourg Court is open to question and they are not based on any explicit wording in the Convention. Whether and to what extent any more extensive doctrine than one embodying the UK's explicit obligation under the Torture Convention should be embodied in a UK Bill of Rights is a matter for

Draft Articles	Explanatory Notes
	debate.
2. No citizen may be compulsorily removed from the United Kingdom except in accordance with a process of extradition prescribed by law under which the citizen has the right to challenge the lawfulness of removal in a court of the United Kingdom.	It would be possible to include more substantive rights in respect of extradition; for example, a right to have a court in the United Kingdom review the question of whether there is a prima facie evidence of commission of an offence, or a bar to extradition where it would lead to the imposition of disproportionate penalties.
Chapter 3: Private and family life	
	The technique is adopted here of replacing the very brief and generally worded text of Article 8 with more specific provisions dealing with different aspects of the protection it was intended to provide, with a final "wrap-up" article dealing more broadly with this subject area.
Article 12: Searches, seizures and interception of communications	
1. Everyone has the right not to be subjected to search or seizure, whether of or from the person, the home, other property or vehicles.	Numerous bills of rights of common law countries (e.g. the Fourth Amendment to the US Constitution) contain specific protection against searches and seizures, and some more recent ones extend the protection to correspondence or communications. As drafted, this Article does not contain any qualifying words such as "unreasonable" or "without probable cause", since searches and seizures authorised by law for proper purposes are catered for by the general qualifications clause in Article 24.
2. Everyone has the right not to have his or her private communications intercepted.	
Article 13: Information about individuals in the hands of public authorities In view of the huge growth of databases and information handling since the Convention was drafted, this is a subject area which a modern Bill of Rights needs to address.	
1. Public authorities shall not collect private information about individuals except to the extent that is shown to be reasonably necessary for	These rights are subject to the general qualifications in Article 24. So, for example, an individual would not be entitled to demand access to a police intelligence file because that would interfere with the enforcement of the criminal law, nor to demand access to information

Draft Articles	Explanatory Notes
public purposes.	supplied on a confidential basis by another person (because to do so would interfere with the rights of others).
2. Public authorities shall take reasonable care to preserve the privacy of information about individuals where that information is private in nature or has been acquired in circumstances giving rise to an expectation that its privacy will be preserved.	Para 2 is limited (unlike "personal data" under the Data Protection Act 1998) to information which is private in nature, either inherently or as a result of the expectation arising from the circumstances of its collection.
3. Where information about an individual is held by a public authority, that individual or his or her duly authorised representative shall have a right of access to that information in order to check and if appropriate challenge its accuracy and the purposes for which it is held or used. This right does not however arise unless there is a tangible risk of that information being used or disclosed to the detriment of the individual, and such potential detriment outweighs the cost or difficulty of locating and giving access to the information.	The second sentence of para 3 is intended to prevent a wide ranging and potentially costly duty arising (as it can sometimes under the Data Protection Act 1998) to locate information about individuals unless there really is a good reason to fear that its inaccuracy or misuse will cause tangible harm.
Article 15: Right to self defence	
Everyone has the right to use such force as appears necessary in the circumstances in the defence of self, family, home or property when unlawfully violated or threatened.	

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Article 16: Children	
When a minor child is removed from the custody of a parent or other person *in loco parentis*, that person shall enjoy the right to challenge the lawfulness of the removal before a court without delay.	The removal of children from their families is as important as the imprisonment of adults and should be subject to similar safeguards.
Article 17: Right to education	
1. No person shall be denied the right to education.	It should be noted that this is an obligation on the State not to interfere with access to education and does not amount to a positive obligation on the State to provide education at public expense.
2. In the exercise of any functions which they assume in relation to education and to teaching, public authorities shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions, but only so far as compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure	This reflects the second sentence of ECHR Protocol 1 Article 2, with the addition of the wording of the UK's reservation.
Article 18: General right to respect for private and family life	
1. Everyone has the right to respect for his or her private and family life, home and correspondence.	The aim of this Article is a general sweep-up of the very wide range of matters potentially within this field and potentially within the scope of Article 8 ECHR.
2. Where specific provision is made for the protection of these interests in statute or in secondary legislation, no further right to protect these	This limitation, if included in the Bill of Rights, would make clear that where Parliament (or a secondary legislator with the approval of Parliament) has struck a specific balance between these and other interests in legislation there is then no additional right to invoke this

Draft Articles	Explanatory Notes
interests arises under this Article.	Article to over-ride that balance. It would be a matter for political decision whether such a limitation should be included in the Bill.
Chapter 4: Freedoms of conscience, expression, association and marriage	
Article 19: Freedom of thought, conscience and religion	
1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his or her religion or belief and freedom, either alone or in community with others and in public or private, to manifest his or her religion or belief, in worship, teaching, practice and observance.	The wording of paragraph 1 reflects Article 9.1 ECHR.
2. The following shall not be regarded as contrary to this Article:-	This is intended to clarify its scope to prevent its misuse as an instrument to pursue political agendas through the courts.
(a) the inclusion in the Union flag, the flags of nations of the United Kingdom, other official flags, or the Royal and other official arms and emblems, of religious symbols or words;	
(b) the holding of public holidays on religious festivals;	
(c) the conduct of religious ceremonies on public or official occasions, including ceremonies in accordance with the practices of the established churches in England and Scotland.	
3. Nothing in paragraph 2(c) shall prevent the conduct of religious observances of other faiths at public or official occasions.	This makes it clear that public authorities are free to accord equal respect to other faiths as appropriate.

Draft Articles	Explanatory Notes
Article 20: Freedom of expression	
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart **information** and ideas without interference by a public authority and regardless of frontiers. This Article shall not prevent the licensing of broadcasting, television or cinema enterprises.	This reflects Article 8.1 ECHR.
2. Everyone has the right, if acting reasonably and responsibly, to publish statements which are in the public interest.	The basis of this provision is the so-called *Reynolds* public interest defence to defamation, as recognised by the House of Lords in *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 24, as recently explained and refined by the Supreme Court in *Flood v. Times Newspaper* [2012] UKSC 11. This paragraph would provide a general defence, not just a defence to defamation claims, but would be subject to being restricted under Article 24 below. Some critics have argued that the *Reynolds* defence is too restricted and hedged with conditions even after its reaffirmation in *Flood*. A more widely drafted provision might be considered for the Bill of Rights: for example one which goes more towards the 'public figure' defence set out by the US Supreme Court in *New York Times Co v. Sullivan* (1964) 376 US 254 based on the First Amendment.
3. No interim injunction or interdict may be granted to restrain an alleged defamation, malicious falsehood or trade libel if the defendant intends to justify its truth or contends that it is fair comment on a matter of public interest, unless there is evidence upon which no reasonable court could fail to find it to be untrue or not to be fair comment.	This sets out the rule of law which was established by the Court of Appeal in *Bonnard v. Perryman* [1891] 2 Ch 269, where Lord Esher said: "The right of free speech is one which it is for the public interest that individuals should possess ... the importance of leaving free speech unfettered is a strong reason is cases of libel for dealing most cautiously and warily with the granting of interim injunctions."

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4. If a court is considering whether to grant any relief or remedy which, if granted, might affect freedom of expression, then: (a) If the person against whom the application for relief or remedy is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied-- (i) that the applicant has taken all practicable steps to notify the respondent or (ii) that there are compelling reasons why the respondent should not be notified; and (b) No such relief or remedy is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is more likely than not to establish that publication should not be allowed.	This is based closely on s 12(1)-(3) HRA 1998, with the meaning of "likely" clarified.
Article 21: Freedom of assembly and association	
1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join, or not to join, trade unions.	
2. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces,	

Draft Articles	Explanatory Notes
of the police or of the administration of the State.	
Article 22: Right to marry	
Men and women of marriageable age have the right to marry and to found a family, according to the laws governing the exercise of this right.	
Article 23: Protection of property	
1. Every person is entitled to the peaceful enjoyment of his her or its possessions. No person shall be deprived of possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.	
2. The preceding provisions shall not prevent the enforcement of laws deemed necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.	
Chapter 5: Qualifications to rights, responsibilities and scope	
Article 24: Restrictions on the exercise of rights	
1. Restrictions may be placed on the exercise of the rights and freedoms laid down in this Bill of Rights, other than those in Articles 6 in its application to criminal offences, 8, or 9.1, provided they are prescribed by law and are necessary in a	Combines together the substance of the “qualified rights” clauses in Articles 8.2, 9.2, 10.2 and 11.2 ECHR.

Draft Articles	Explanatory Notes
democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.	
2. In considering whether a restriction is justified under this Article, regard may be had to the extent of the fulfilment of their responsibilities by those affected by the restriction. For this purpose, everyone is to be regarded as responsible for obeying the law, for respecting the rights and freedoms of others, and for providing as permitted by his or her abilities and circumstances for self and family.	Para 2 on responsibilities is self-explanatory.
3. Nothing in this Bill of Rights may be interpreted as implying for any group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation by unlawful means.	Para 3 reflects the substance of Article 17 ECHR on abuse of rights, however the words “by unlawful means” are added to make clear that lawfully campaigning for limitation of rights in the Bill should not be restricted.
Article 25: Territorial scope of the Bill of Rights	
1. This Bill of Rights applies within the territory of the United Kingdom.	The Human Rights Act 1998 has been interpreted as extending to cover certain activities of the Crown (mainly armed forces operations) abroad. As drafted, this would restrict the Bill of Rights in its operation to the territory of the United Kingdom but activities abroad will still be

Draft Articles	Explanatory Notes
	covered by the general law. It would be a matter for political decision whether the Bill of Rights or parts of it ought to apply extra-territorially.
2. Her Majesty may, with the consent of the legislature of the territory concerned, by Order in Council direct that this Bill of Rights shall extend, subject to such modifications as may be agreed by the legislature and specified in the Order, to – (a) any of the Channel Islands (b) the Isle of Man (c) any colony.	This provides general machinery which could be used in the future to extend the Bill of Rights to these territories. Such an extension, first, would require the consent of the legislature concerned, and secondly (again by consent) could involve modifications to the Bill of Rights to accommodate local conditions or (for example) the different legal traditions of the Channel Islands and Isle of Man.
Article 26: Application of the Bill of Rights as regards persons	
1. The rights and freedoms in this Bill of Rights shall be enjoyed by individuals who are citizens of the United Kingdom.	
2. Citizens of other Member States of the European Union shall be entitled to those rights to the extent provided for by or under the Treaty on European Union or the Treaty on the Functioning of the European Union.	
3. Non-citizens shall be entitled to the rights and freedoms in the Bill of Rights save for those set out in Articles [....]; and nothing in this Bill of Rights shall prevent restrictions being placed on the political activities of non-citizens.	The core and central rights in the Bill should be enjoyed by citizens and non-citizens alike; but it may be desirable carefully to consider whether some of the rights which are more civic in nature ought to extend to non-citizens. In this regard it might be appropriate to make a distinction between non-citizens who are lawfully present in the United Kingdom and those who are not. The reference to the political activities of non-citizens reflects Article 16 ECHR.

Draft Articles	Explanatory Notes
4. Corporate bodies (apart from public authorities) are entitled to the rights and freedoms in Articles [.....] In respect of a criminal charge against itself, a corporate body is entitled only to the safeguards in Article 4 (penalties).	Again, the extent to which companies and other corporate bodies should be entitled to the rights in the Bill needs to be carefully considered. In the ECHR itself, only the protection of property under Article 1 of Protocol 1 explicitly requires protection to be extended to legal persons. However for example the right to freedom of expression needs to extend to a newspaper which is a corporate body in order that the rights to impart information and opinions can be effectively enjoyed by journalists who work for the newspaper and the right to receive can be enjoyed by its readers. On the other hand, it does not seem appropriate that a corporate body should be entitled to the full panoply of rights, such as the right against self-incrimination, which would be enjoyed by an individual facing a criminal charge.
5. A corporate body may rely on any other right or exercise any other freedom under this Bill of Rights where this is necessary for the effective protection of the rights and freedoms of individuals.	
Article 27: Discrimination	
The enjoyment of the rights and freedoms set forth in this Bill of Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.	This closely reflects the wording of Article 14 ECHR, which prohibits discrimination within the scope of the rights guaranteed by the Convention. However it can be strongly argued that a national Bill of Rights should provide for a broader based provision against discrimination and a more general right to the equal protection of the law could be considered.

This Bill of Rights is drafted on the assumption that it will operate throughout the United Kingdom, as is made clear by the inclusion of references to the Claim of Right. This is not intended to pre-judge the issues raised by devolution, nor to suggest that a UK Bill of Rights should be brought into operation within the scope of the devolved powers of the Scottish Parliament or of the Welsh nor Northern Ireland Assemblies without their consent.

This draft Bill does not contain provisions dealing with a number of aspects of how the Bill of Rights would operate, such as declarations of incompatibility and the interpretation of legislation to conform with it, duties on public authorities, relief and remedies, and ministerial statements of compatibility and Parliamentary scrutiny of Bills. These are conveniently described by Anthony Speaight QC in his paper as the "mechanisms" of a UK Bill of Rights. Some of these mechanisms could conveniently be integrated into the text of a UK Bill of Rights, a course which was not possible in the HRA where the text of the Convention setting out the rights is necessarily separate from the text of the Act itself containing the mechanisms.

I am in broad agreement with Anthony Speaight's analysis of the existing mechanisms in the Human Rights Act 1998 and his suggestions as to how those mechanisms might be reformed or improved under a UK Bill of Rights. In particular, I believe that the approach adopted by the courts in *Ghaidan* and other cases about what can be done by way of "interpretation" of other legislation under section 3(1) of the HRA 1998 has seriously disturbed the intended constitutional balance between the courts and Parliament. It has enlarged the circumstances in which courts effectively re-write legislation which they consider to be incompatible with Convention rights, and correspondingly reduced the circumstances in which it is left to Parliament to decide what is to be done following the making of a declaration of incompatibility.

A further important issue addressed in Anthony Speaight's paper is what role the decisions of the Strasbourg Court (and other international courts) should play in the interpretation of a UK Bill of Rights. For my part I consider that the decisions of the Strasbourg Court in many respects have departed from the Convention by embroidering onto the Convention doctrines and interpretations which are neither there in the words of the Convention nor can reasonably have been intended by the States who drafted the Convention, and also that it has failed sufficiently to respect the margin of appreciation which should be accorded to the democratically arrived at decisions of the member States.

In my view a UK Bill of Rights should reflect and build on the rights in the Convention itself. But it does not follow that it should slavishly follow every twist and turn of the doctrines formulated in the decisions of the Strasbourg Court.

Entrenchment of a UK Bill of Rights

by Martin Howe QC

One important question to be considered in the event that the United Kingdom adopts a UK Bill of Rights is whether or not it should be 'entrenched' in some way. The word 'entrenchment' may be used in relation to two related but distinct concepts:

1. the 'entrenchment' of the text of the Bill of Rights itself by making the Bill in some way harder to repeal or amend than ordinary legislation;

2. 'entrenching' the Bill of Rights as against other legislation, by giving it a special or greater status in the event of a conflict between its provisions and those of other legislation.

It is of course possible that the United Kingdom might choose one day to adopt a written constitution which would supersede the present doctrine of supremacy of Parliament and replace it with what would be in effect the supremacy of the written constitution. Under those circumstances the position of a Bill of Rights would be different both legally, constitutionally and politically from its role under our present constitutional arrangements and its entrenchment in some form in a similar way to other written constitutions would need to be addressed. **However I will address the question of entrenchment on the assumption that a Bill of Rights were implemented within the scope of our current constitutional arrangements under which Parliament is, as a matter of legal doctrine, supreme.**

As can be seen from the different Bills of Rights or statements of fundamental rights which we have surveyed in chapter 3, many Bills of Rights are constitutionally entrenched. This means that they may actually form part of the constitution (or be of equivalent legal status) and can therefore only be amended or repealed by a special procedure for constitutional amendments which is usually more onerous than the procedure for passing ordinary legislation, or may for example require a special or enhanced majority vote in order to pass. In addition, it is normal for constitutionally entrenched bills of rights to prevail over ordinary legislation in the event of conflict.

Probably the best known example of a Bill of Rights with strong constitutional entrenchment is the United States Bill of Rights, which forms part of the Constitution (see chapter 3). The procedure for amending the Constitution is difficult and requires a very high degree of political consensus. In the event of a conflict between a provision of the Bill of Rights or

another part of the Constitution and an Act of Congress, the courts have the power effectively to nullify the Act of Congress.[1]

Before turning to the question of what kind of entrenchment of a Bill of Rights (if any) might be desirable within the different constitutional and political context of the United Kingdom, I first need to address the question of what kind of entrenchment would be *possible*, given the constitutional doctrine of the supremacy of Parliament. Under this doctrine, Parliament has no power to bind a future Parliament and accordingly, even if it passes an Act which purports in some way to entrench itself against repeal or against being superseded by a future Act, a later Act passed by the normal legislative procedure can always override it.

Under a purist interpretation of the doctrine of supremacy of Parliament, an earlier Act of Parliament, whatever its status or nature, will always be over-ridden by a later Act; and if the later Act does not expressly repeal the earlier Act, the earlier Act is still regarded as impliedly repealed to the extent that it is inconsistent with the later one.[2]

The doctrine in that pure form has however been demonstrated to be wrong, or at least has been superseded by later changes in judicial thinking. In order to give effect to the United Kingdom's membership of the European Economic Community (as it was then called), Parliament passed the European Communities Act 1972. Section 2(1) provided that the Treaty of Rome itself and Community law made under it be given effect in UK domestic courts ('direct effect'). Section 2(4) contained a provision dealing with the relationship between that Act and other Acts of Parliament: "any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section."

This raised the question of what would happen if Parliament were to pass an Act of Parliament which was in conflict with a provision of Community law to which section 2(1) of the 1972 Act gave direct effect. The answer was provided by Lord Bridge in a case which concerned a conflict between the Merchant Shipping Act 1988 which sought to outlaw "flags of convenience," and the directly effective provisions of the Treaty of Rome.[3] Lord Bridge said, after quoting the words from section 2(4) of the 1972 Act set out above:

> "this has precisely the same effect as if a section were incorporated in Part II of the [Merchant Shipping Act 1988] which in terms enacted that

[1]Sometimes referred to as a power to 'strike down' Acts of Congress as unconstitutional. Although not explicitly spelled out in the Constitution itself, this power of the courts was established by the early decision of the US Supreme Court in *Marbury v. Madison* 5 US (1 Cranch) 137 (1803).

[2]The doctrine in this form drew support from the *obiter dictum* of Lord Justice Maugham in *Ellen Street Estates Ltd v. Minister of Health* [1934] 1 KB 590, CA, at 597: "The legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the legislature."

[3]*R v. Secretary of State for Transport ex p. Factortame Ltd* [1990] 2 AC 85 at 140B-D.

> the provisions with respect to registration of British fishing vessels were to be without prejudice to the directly enforceable Community rights of any nationals of any member state of the EEC."

In accordance with this approach, it is now clearly established that the courts of the United Kingdom will disapply Acts of Parliament to the extent that they are inconsistent with a directly effective provision of Community law (now EU law). This approach is not however in conflict with the doctrine of the supremacy of Parliament because it reflects the continuing will of Parliament as expressed in the 1972 Act that directly effective provisions of EU law have a special status which immunises them against unintentional implied repeal or being impliedly overridden by later Acts. But if Parliament were to make its intention clear that a later Act was to override an EU measure and have effect despite the section 2(4) of the 1972 Act, then the courts would give effect to that later Act and would not apply the EU measure.[4]

In our view it would be possible as a matter of law to give a similar entrenched status to the provisions of a UK Bill of Rights. Although section 2(4) of the 1972 Act is linked to the UK's external treaty obligations, it is not essential for the operation of a provision of this kind that it should be linked to an external obligation. Parliament could enact that all earlier and later Acts should be construed and have effect in the light of the Bill of Rights, and accordingly the courts would then have the power and the duty to disapply any earlier or later Act to the extent that it was found to be inconsistent with a provision of the Bill of Rights.

However it does not follow from the fact that such a measure of entrenchment is legally possible that it is either constitutionally or politically desirable, assuming again that a Bill of Rights were to be introduced under our current constitutional arrangements rather than as part of a revision of the UK's constitutional arrangements in which the doctrine of supremacy of Parliament were itself to be modified. The current position under the HRA 1998 is that Acts of Parliament are subject (by section 3) to being interpreted so far as possible consistently with Convention rights, and the Human Rights Act is not subject to repeal by a later Act unless Parliament expresses its intention to repeal or modify the Human Rights Act in very clear terms.[5]

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[4] *Thoburn v. Sunderland City Council* [2003] QB 151. This principle has since been reaffirmed by the enactment of section 18 of the European Union Act 2011 which provides that the status of EU law in the United Kingdom is dependent on a continuing statutory basis. Although this might create a conflict with the UK's obligations on the international plane, Parliament's will would prevail in the UK's domestic courts.

[5] *R v. Secretary of State for the Home Dept; Ex parte Simms* [2000] 2 AC 115 at 130 where Lord Hoffmann said: "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights… The constraints on Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, through acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

However if a later Act cannot, in the opinion of the courts, be read consistently with those rights, it is subject to a declaration of incompatibility but the making of such declaration does not result in the Act ceasing to have effect. This arrangement leaves the decision to Parliament as to whether or not to repeal or amend the provision of the Act in question or to keep it fully in force despite the view of the court that there is a conflict.

This mechanism (sometimes called “soft” entrenchment) under the Human Rights Act 1998 reflects the holistic approach of that Act which does not rely exclusively upon the courts for the protection of rights, but directly involves the political branches in their protection and shares responsibility for decision making with those branches, rather than setting up direct opposition between the political branches and the courts.

The arguments for Parliament having the power of and responsibility for deciding whether or not to amend or repeal legislation found by the courts to be inconsistent with a UK Bill of Rights would be even stronger than under the Human Rights Act. Since there would be a less direct linkage between the provisions of the Bill of Rights and the external treaty obligations of the UK, Parliament would effectively have greater scope to disagree with or depart from court rulings on the application of the Bill of Rights without facing arguments that it was thereby causing the UK to breach its international obligations.

Replicating the current position under the Human Rights Act that courts may declare Acts to be incompatible with the Bill of Rights, but that only Parliament may decide whether to amend or repeal them in the light of that finding, would keep Parliament as the ultimate master of the interpretation and application of the Bill of Rights, enhance Parliament’s sense of responsibility for the protection of those rights, and reduce the potential for conflict between the courts and Parliament.

The further question is whether the text of a Bill of Rights should be subject to any form of entrenchment against amendment. In our view it should not, for reasons which are both practical and of principle.

The practical reason is that however carefully the text of a Bill of Rights is drafted and however widely it is scrutinised, the very nature of such a Bill means that it is almost inevitable that it may contain undetected defects or may be interpreted in unexpected ways and may produce unexpected effects. If it can be amended by the ordinary legislative process then such problems can be corrected.

The reason of principle is that I think it undesirable that one Parliament should seek to bind its successor by enacting a Bill of Rights and then erecting legal barriers with the intention of preventing a subsequent Parliament from modifying the Bill or revising the rights which it contains. In our view the force of a Bill of Rights would (and should) largely arise from the degree of political respect it earns and enjoys rather than from attempts to give it special legal force.

In Defence of Rights

by Baroness Kennedy of The Shaws QC and Professor Philippe Sands QC

In March 2011 the Government established a Commission on a Bill of Rights, charged with investigating

> "the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extends our liberties."

We accepted appointment with an open mind about a possible new Bill of Rights for the United Kingdom, on the basis of terms that to us were clear and left no room for doubt on a crucial issue: any future UK Bill of Rights must "incorporate" our obligations under the European Convention, and its rights must "continue to be enshrined in UK law". Perhaps in setting the terms, and rooting our remit within an acceptance that the UK would remain part of the established European system, it was hoped that a high level of agreement might be reached. That has not been possible, because three of our number appear to us to be committed to a UK Bill of Rights as a preliminary step to withdrawal from the whole European system.[1]

We have been pleased to join with our colleagues on certain important aspects of the Commission Report, in particular the recognition that now is not the right time to embark on changes to the Human Rights Act. There is broad agreement that future developments should await the outcome of the Scottish referendum, after which a Constitutional Convention would be the most desirable place to consider these matters, within the context of a wider constitutional review, one that allows all parts of the United Kingdom to be involved in a suitable manner.

We are pleased also to support the Commission's interim and final advice to the Government on reform of the European Court, which sets out a number of areas in respect of which we believe that certain specific changes could be made which would be helpful and desirable. There are of course court decisions here and in the European Court with which one may reasonably disagree. In general, however, we believe that the European Court (as well as the Convention) has played a vital and positive role in contributing to the promotion of human rights across Europe, even if it is far from being a perfect institution. The challenge is to

[1]Our view is summarised in Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (December 2012) ("*Commission Report*"), vol. 1, 'Overview', at para. 88.

continue improving upon its functioning, as we have sought to do in our domestic courts over recent decades.

We are unable, however, to join our colleagues on the central issue, namely whether in principle we are in favour of a UK Bill of Rights. It is impossible to speak of principle when the true purport is not being addressed explicitly and would include, for some at least, a reduction of rights. We consider that the moment is not ripe to start moving towards a UK Bill of Rights until the parameters of such proposals are clearly set out. We note in this regard that our colleagues in the majority have, in our view, failed to identify or declare any shortcomings in the Human Rights Act, or in its application by our courts. We consider that it would be preferable to leave open the possibility of a number of options that, without prioritisation, could be addressed by a future Constitutional Convention. These options include maintaining the *status quo*, or adopting a new and free-standing Bill of Rights, or moving to new constitutional arrangements that would incorporate and build upon the rights protected by the Human Rights Act.

In reaching this conclusion we have been influenced by three important factors, all closely connected: devolution; the responses to our consultations; and the view of some of our colleagues on decoupling the connection between the United Kingdom and the European Convention. We return to these points below, but before doing so it is appropriate to place our work in context.

Context

Seventy years ago, Winston Churchill declared one of the aims of the Second World War to be the "enthronement of human rights".[2] Within a decade, the United Kingdom was leading international efforts on a non-binding Universal Declaration of Human Rights (1948) and, shortly after, negotiations were concluded for the European Convention on Human Rights (1950). These two instruments opened the door to a new international legal order, one that placed the protection of the individual at its heart and set limits on the actions taken by states and their governments. The European Court in Strasbourg was created to provide enforceable safeguards against abuses of public authority.

These developments were recognised as being likely to have profound consequences. Professor Hersch Lauterpacht, the Whewell Professor of International Law at the University of Cambridge whose 1945 book first proposed a draft international bill of rights, wrote of a "radical innovation in international practice and to a surrender … of the sovereign rights of the State", nothing less than "a substantial sacrifice by states of their freedom of action".[3] David Maxwell-Fyfe, who led the negotiations that led to the European Convention (and went on to be Home Secretary in the 1951 Conservative Government) welcomed the Convention as "a simple and safe insurance policy" in favour of "a minimum standard of democratic

[2] *The Times*, 30 October 1942, cited in Hersch Lauterpacht, *An International Bill of the Rights of Man* (1945), p. 86.
[3] Lauterpacht, *An International Bill of the Rights of Man* (1945), pp. 81-2.

conduct", a text that set out "a system of collective security against tyranny and oppression."[4] He recognised too the implications for the UK, namely that "the Convention superimposes an international code on our unwritten constitution".[5]

The United Kingdom ratified the European Convention in 1951, and it came into force two years later. It took another thirteen years before the UK agreed to give individuals in the UK the right to file complaints with the European Commission, and later the European Court, in Strasbourg. Three more decades passed before the rights set out in the European Convention could be invoked before judges in all the courts of the United Kingdom, an innovation that arrived with the adoption by the Labour government of the Human Rights Act in 1998, and its coming into effect in 2000. This brought rights home and should be a source of pride. It cannot be said that the UK has moved with undue haste in these matters, or that it embraced the European Convention with its eyes closed.

In our view the Convention has brought important benefits for Europe and the United Kingdom. Individuals in 47 states are now able to challenge abuses of public power to an international court in Strasbourg. At home, the Convention has brought great benefits: it has, for example, reinforced our commitment to due process in court proceedings, to children's rights and the rights of the elderly in care homes, to freedom of expression and assembly, and to protecting individuals from unfair extradition (as Home Secretary Teresa May has recently acknowledged in the case of Gary Mackinnon). In reinforcing the ban on torture it has served as a source of international inspiration. "Most of the supposed weaknesses of the Convention scheme are attributable to misunderstanding of it, and critics must ultimately answer two questions", wrote Lord Bingham, the former Senior Law Lord.[6] "Which of the [Convention's] rights would you discard? Would you rather live in a country in which these rights were not protected by law?"

Despite these benefits, and the fact that the courts of the United Kingdom are now able to influence developments in the Strasbourg Court by their interpretation and application of rights under the Convention, the Human Rights Act has been the source of concerns since its inception. This is coupled with complaints that the European Court set up under the 1950 Convention has increasingly interpreted and applied the Convention in a way that its drafters never intended. Critics seize on some judgments – such as that which ruled that Britain's blanket ban on allowing prisoners to vote[7] – as evidence of a court that has spiralled out of

[4]David Maxwell-Fyfe, Political Adventure: The Memoirs of the Earl of Kilmuir (1964), p. 180.
[5]Ibid., p. 184.
[6]Tom Bingham, The Rule of Law (2010), p. 84.
[7](2006) 42 EHRR 41. We consider the judgment to be correct on its merits, and note that it adopts the same approach as the Australian High Court and the Hong Kong Court of First Instance in rejecting a blanket ban on prisoner voting whilst leaving open a more selective and proportionate ban: Roach v AEC and Commonwealth of Australia [2007] HCA 43, and Chan Kin Sum v Secretary for Justice and Electoral Affairs Commission, HCAL 79/2008 (8 December 2008).

control.[8] We do not share this view and consider that the Court's approach is consistent with established principles of international law governing the interpretation and application of treaties. What some politicians and elements of the media have repeatedly failed to make clear to the public is that the Court was criticising the totality of the ban: the Court did not question the principle that serious offenders should not be allowed to vote.

Over the past eighteen months the level of opprobrium heaped by some on the Convention and the Court has grown, and much of it is based on misinformation, often deliberate. A few weeks ago Sir Nicolas Bratza, who recently retired as the UK judge and President of the European Court, spoke of "a crescendo in the criticism of the Court from many quarters in the United Kingdom, in which it has been accused of inefficiency, incompetence and meddling in affairs for which it was not created".[9] He has responded forcefully, in terms with which we agree, pointing out that "the Strasbourg Court is not a 'foreign' court", but "an international court in a system in which the United Kingdom has from the outset played, and continues to play, an important role and in which a United Kingdom judge sits in all cases against his or her country"; that the UK has voluntarily signed up to the Convention which imposes requirements as a matter of legal obligation, and that "[t]o disregard judgments is to fly in the face of the rule of law"; and that "the negative attitude to the Court and the hostile language in which it is frequently expressed not only does damage to the authority of the Court within the United Kingdom; it also, regrettably, does profound damage to the standing of the United Kingdom within the international community."

This is the general background against which the present Coalition Government decided to set up a Commission on a Bill of Rights.

Devolution

The first factor that has caused us to depart from the majority is *devolution*. It has become clear that the United Kingdom is in the process of significant constitutional transition. Ruth Davidson, Leader of the Scottish Conservatives, has rightly noted that the UK "has experienced a great deal of constitutional change in the last 15 years, not least the establishment of a Scottish Parliament and Assemblies in Wales and Northern Ireland."[10] The Human Rights Act is embedded into these constitutional developments, in such a way that any alterations to the Act are likely to have significant implications for the powers of the devolved legislatures. The full impact of this interweaving has only become apparent to us over the course of our work and in the counsel we have received from our advisers from

[8]We regret that, in the course of our work, the Prime Minister told the House of Commons that he would defy the European Court's judgment and that "no one should be in any doubt: prisoners are not getting the vote under this Government" (Hansard (HC), 24th October 2012, cols. 922-23). He spoke on the same day that the Attorney General, the Rt Hon Dominic Grieve QC, MP, advised the House of Commons Justice Committee that the UK is obliged to comply with the European Court's judgment.

[9]Nicholas Bratza, 'Comments' offered at reception and dinner held at Lincoln's Inn, Tuesday 13 November 2012.

[10]Evidence to the House of Commons Select Committee on Political and Constitutional Reform, 'Do we need a Constitutional convention for the UK?', September 2012, http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpolcon/writev/constconv/cc16.htm, at para. 2.

Scotland and Wales. Some of the challenges are set out in the thoughtful paper prepared by one of our colleagues.[11]

Moreover, since the Commission was established more constitutional changes have come into sight, and a date has been set for a referendum on Scottish independence (in autumn 2014), the outcome of which could have significant consequences for the whole of the United Kingdom. Even without this event, there are calls for greater autonomy as the UK moves incrementally and inevitably towards a recognisable federal structure. We are greatly concerned, therefore, that a premature move towards a UK Bill of Rights would be contentious and possibly even dangerous, with unintended consequences. In our view, some of our colleagues on the Commission have failed to acknowledge the full implications of the relationship between a possible UK Bill of Rights and the United Kingdom's other constitutional arrangements.

It is plain that any Bill of Rights – as well as any other options that would alter the scheme set up the Human Rights Act – would have to reflect the changing allocation of powers in the reconfiguration of the United Kingdom. The idea of a Constitutional Convention following the Scottish referendum in 2014 appears to have growing support,[12] and in our view that is the proper place to decide on which (if any) of various options should be taken forward, whatever the outcome of the referendum.

Consultations

This brings us to the second factor, namely the *views expressed in our consultations and deliberations*, which we cannot ignore. We are acutely conscious, in this regard, that our Commission is so unrepresentative and unbalanced in its membership (all white; male lawyers, all bar one; and based in London, all bar one) that it should pay particularly careful attention to the views expressed to it during its work programme and consultations. Whilst in the minority on the Commission, our views are aligned with the views put to us by respondents to our two consultations and by many others with whom we consulted, as this Report recognises,[13] in the sense of overwhelming support to retain the system established by the Human Rights Act (and very considerable opposition, for now at least, to the idea of a UK Bill of Rights). 88% of respondents who answered our 'retain or repeal the HRA?' opted for retention (the percentage rises to 96% if you include the 1800 postcards received as part of organized campaigns that expressly advocated retaining the HRA).[14] 98% of people who answered the question on the relationship between the Convention and UK law thought that the Convention rights should continue to be incorporated.[15] The recent report of the British Academy Policy Centre is consistent with these views, and articulates them with clear

[11]Anthony Speaight, 'Devolution Options', in *Commission Report*, vol. 1.
[12]Simon Johnson, 'Tories back new UK constitutional settlement', *Daily Telegraph*, 5 October 2012.
[13]*Commission Report*, vol. 1, Overview, for example at paras. 25, 34 and 68.
[14]*Commission Report*, vol. 2, Annex G, Consultation Summary, para. 6.
[15]*Ibid*., paras. 40-41.

force.[16] Moreover, it is abundantly clear that there is no 'ownership' issue in Northern Ireland, Wales and Scotland (or, it would appear, across large parts of England), where the existing arrangements under the Human Rights Act and the European Convention on Human Rights are not merely tolerated but strongly supported.

In our view, the Commission as a whole gave insufficient weight to the totality of views received, and in particular those coming from the devolved nations. In Wales, for example, a Conservative member of the Welsh Assembly told us that "as a Tory I suppose I have to say that I'm in favour of a Bill of Rights, but actually the existing arrangements are broadly supported in Wales". Another participant at a meeting in Cardiff told us that he would rather have matters of human rights decided by the European Court in Strasbourg than "a Supreme Court in London on which there is no Welsh member". In Belfast, at a lunch seated between a representative of the Ulster Unionists and of Sinn Fein, it was made clear to us that a point of agreement between them was that it should be for Northern Ireland to sort out its own Bill of Rights. In Scotland, the opposition to a UK Bill of Rights was widespread and existed across the political spectrum.

These were not minority or exotic views. Yet most members of the Commission took a distinctly London-centric view of the evidence, failing in our view to grasp the strength and depth of concerns expressed (particularly north of the border) about the timing of our endeavours. "We mustn't let the tail wag the dog" was a refrain from some when we raised these points, even as it became clear to us that the real tail in our work has been rooted firmly in central London.

Against the weight of evidence before us, the prime motivator for the majority in forging a new Bill of Rights is said to be a desire to enable the public to claim greater 'ownership' of their rights, and to counteract feelings of negativity towards the Human Rights Act. Where is the evidence for that? We saw little to show that hostility was as widespread as some would like to portray. In fact the bulk of the evidence went the other way. Those who expressed opposition often repeated misinformation or insisted that they wanted to see greater emphasis on responsibilities, a path that can be followed without revisiting the current legislation.

Decoupling

This brings us to the third factor that causes us to take a different path from our colleagues in the majority: in the course of our deliberations it became evident that a number of them

[16]The report concludes that "it remains open to question whether replacing the HRA with a Bill of Rights would improve UK human rights law for the better": Colm O'Cinneide, Human Rights in the UK Constitution (British Academy Policy Centre, September 2012), p. 47. We are not here able to refer to the many responses to the two consultations which have influenced our conclusions, but wish to pay tribute to all who responded for the considerable time and effort that has so obviously been put into efforts to assist the Commission.

would like the United Kingdom to withdraw from the European Convention.[17] Whilst accepting that others in the majority would join with us in envisaging no circumstances in which they would support such a move, the unambiguous expression of such views offered openly in the course of our deliberations has made it clear to us that for some of our colleagues a UK Bill of Rights is a means towards withdrawal from the European Convention. We believe that such a path would be catastrophic for the United Kingdom, for Europe and for the protection of human rights around the world. The fact that a significant number in the majority could hold such views is deeply troubling.

We would have been partially reassured if we believed that our colleagues had adopted a path that stuck faithfully to the Commission's clear terms of reference, which requires us to investigate a Bill of Rights that "incorporates and builds on all our obligations under the European Convention on Human Rights enshrined in British law". In our view, the majority on the Commission has not stuck with the language as it is set out in our terms of reference, and this represents a clear departure that is not accidental. We fear this is to satisfy those colleagues who oppose the continued incorporation of the Convention into UK law as a first step to withdrawal from the Convention. This opens up the possibility that their conclusions, however tentative, will be used to support efforts to decouple the United Kingdom from the European Convention. That is not a risk that we are willing to take or to be associated with, given the United Kingdom's historical and continuing role in the life of the Convention and the promotion of the rule of law around the world.

We agree with the submission received from two well-placed observers – Sir Michael Wood and Elizabeth Wilmshurst – that "[o]ne of the great strengths of UK foreign policy is the United Kingdom's reputation for its strong commitment to the rule of law in international affairs", including "its compliance with its international obligations and its reputation as an upholder of human rights, at home and abroad."[18] We agree too with the concern they express that the United Kingdom's reputation "would suffer grave damage if the UK were to be seen to lessen its ability to comply with its international human rights obligations by repealing or taking action that would dilute the HRA."[19]

These words offer a stark warning as to the consequences of the path that some of our colleagues appear to seek.

The content of a UK Bill of Rights

The Commission discussed the possible content of a UK Bill of Rights but was unable to reach agreement, or indeed even come close. Instead, it was agreed that various examples would be set out in annexes.

[17]See Lord Faulks QC and Jonathan Fisher QC, 'Unfinished Business', *Commission Report*, vol. 1 ("there are strong arguments that the cause of human rights, both in the UK and internationally, would be better served by withdrawal from the Convention and the enactment of a domestic Bill of Rights").
[18]Elizabeth Wilmshurst and Sir Michael Wood, Consultation Paper Response, 24 September 2012.
[19]*Ibid*.

We find it difficult to imagine how agreement could be reached on the idea of a UK Bill of Rights, even in principle, when views are so polarised as to what such an instrument might contain. In our view, it would be preferable for form to follow substance, and for any move as to whether there should be a new UK Bill of Rights (or other options) to await a time when there is a reasonable degree of consensus as to what such a Bill might contain. In part, this is because any new Bill of Rights would have to attract broad support to achieve its objectives. It is readily apparent from the discussions within the Commission that no such consensus is in sight, assuming it could ever be attained at all. The full extent of the differences may be seen in the text prepared by one of our colleagues.[20] This draft proposes, amongst other matters, that the rights that any individual might be able to enjoy will depend on which of three categories of human beings he or she falls into: (i) individuals who are citizens of the United Kingdom, who will on his model enjoy all rights, (ii) citizens of other EU Member States who will enjoy only those rights to the extent provided by EU law, and (iii) everyone else, who will only be able to enjoy a limited set of unspecified rights (but presumably would not be tortured). In our view such an approach is deeply retrograde and inconsistent with a fundamental principle, namely that rights should be secured for all persons within the United Kingdom without discrimination. As one distinguished commentator has recently noted, "[i]t is antithetical to the core idea of human rights that they should be particular to any specific jurisdiction or particular group of people, or that they should be unavailable to any jurisdiction or group of people."[21] The whole point of human rights is that they are an expression of our common humanity.

Our conclusion

Against this background, we consider that the case for a UK Bill of Rights has not been made, and that the arguments put to us against such a Bill remain far more persuasive, at least for now. We remain open to the idea of a UK Bill of Right were we to be satisfied that it carried no risk of decoupling the UK from the Convention. We note that the majority has come together around a single principal argument to justify change: the public does not feel ownership of the Human Rights Act. We have already noted that the evidence before the Commission does not support the conclusion that there is an 'ownership' issue across the United Kingdom. Even if it did, we are not persuaded that a mere re-branding would address the underlying concerns of some of our colleagues. Rather, we fear that the issue of 'ownership' is being used to promote other aims, including the diminution of rights available to all people in our community, and a decoupling of the United Kingdom from the European Convention.

It is normal when sitting on a Commission to press for consensus, and to measure success by reference to the extent to which a text reflects agreement. In this regard, we do not wish to diminish our real appreciation for the way in which the Commission has been chaired, with

[20]Martin Howe QC, 'A UK Bill of Rights', *Commission Report*, vol. 1.

[21]John Eekelaar, 'The Universality of Human Rights Norms: Why the UK should stay with Strasbourg', 28 November 2012, Oxford Human Rights Hub, http://ohrh.law.ox.ac.uk/?p=715.

absolute balance and fairness at all times, and for the substantial efforts and commitment of each of our colleagues. For agreement to be of any value, however, it must be real. We can all agree that the Commission was charged with carrying out important and valuable work, recording the history of the culture of rights within the UK, engaging in consultations and a work programme and summarising the arguments that have been put to us, and looking at arrangements in other jurisdictions.

That said, however, there are matters on which there has been no agreement, and we would have wished some key issues of disagreement to be covered in the main body of the Report. Outside of the 'Overview', for example, the attentive reader will find no attempt to evaluate – as opposed to record – the arguments that were put to us by those who responded to our consultations or shared their views with us. As noted, there is no effort to set out what a new Bill of Rights might contain. This leads us to the conclusion that the majority includes some for whom a Bill of Rights may be little more than a re-branding exercise intended to foster a greater sense of 'ownership', and others for whom a Bill of Rights offers a convenient means to reduce rights, to cast Europe adrift and return to the delusional idyll of an earlier age of sovereign authority unconstrained by obligations set out in international instruments.

Equally troubling, there is no discussion in the Overview or the main report of the relationship between a possible new UK Bill of Rights and the Human Rights Act (would the latter be replaced or supplemented?), or between a possible Bill and the European Convention (would individuals continue to be able to invoke the Convention's rights before our courts? would the judges be able to have regard to the case-law of the European Court?). There are only generalised statements about the mechanisms that a Bill of Rights might adopt, which begs the question as to whether the change is really needed. Striking too is the fact that the main report offers no complaint about the way in which the courts of the United Kingdom have interpreted and applied the Human Rights Act: not one judgment handed down by the courts of the United Kingdom that purports to apply the Human Rights Act or the Convention is identified in the main report for criticism.

Such omissions cause us to question the value of an agreement on the principle of a Bill of Rights that encompasses views characterised more sharply by points of difference as opposed to commonality. These gaps are, in our view, not accidental. Rather, they point to the insurmountable obstacles for the Commission as a whole, in the face of irreconcilable philosophical and political positions, not only between us and some in the majority but also, as we see it, between those in the majority. All members of the Commission could envisage circumstances in which a new Bill of Rights might come into existence at some point in the future, under the right conditions. A number of us are particularly concerned to ensure greater protections against the expansion of the powers of the state, as surveillance and claims to national security become ever more prevalent.

It became clear to us in the minority, however, that a bald statement of support for a Bill – even in principle – masked profound differences. In such circumstances, the notion of a

consensus strikes us as being of limited, if any, utility. It offers a false impression and merely pushes into some distant point in the future the challenge of resolving profound differences.

In short, the fault lines amongst us are real and deep. They relate to the failure to grapple with the content of such a Bill and its purpose, the underlying desire by some to decouple the UK from the European Convention and the jurisprudence of its Court, and the inability to recognise that the days when Westminster can impose its will on these matters across the whole of the United Kingdom are long gone. We see no benefit in creating a superficial consensus. Far better, in our view, to be honest and realistic about the matters that divide, in a way that allows the Report to contribute to the debate and decision-making that is yet to come.

It is better to recognise that at the heart of our differences are distinct beliefs about the reach and purpose of human rights, and about the relationship between matters local, national and international. A UK Bill of Rights may seem harmless and even attractive at first sight, but alarm bells should be ringing about motivations. For us, human rights is about working not just within our own country but with other countries to improve the human condition, to engender respect for all individuals, to protect those who are vulnerable, and to create the conditions for the delivery of justice and peace. To remove the glue that holds us together with other nations is dangerous. Our criticisms of the European Court should galvanise us to reform it, not lead to our cutting ourselves off. If there is to be a Bill of Rights, or any change to the Human Rights Act, it should reinforce the European Convention, not undermine it.

A Personal Explanatory Note

by Lord Lester of Herne Hill QC

Unlike almost all other modern democracies, we in the UK do not have a comprehensive written constitution and Bill of Rights, protected against amendment by ordinary majorities, and empowering the courts to 'strike down' unconstitutional legislation. Instead we have the Human Rights Act and devolution Acts of 1998, together with other ancient and modern statutes and the common law. We use the rights and freedoms protected by the European Convention on Human Rights and the supranational European Court of Human Rights as our enforceable Bill of Rights, leaving it to Parliament to amend flawed legislation.

The Human Rights Act is a well-drafted and subtle compromise respecting both Parliamentary sovereignty and the need for effective legal protection of fundamental rights. It is a code of ethical and legal values to guide both governors and governed; a rallying point for those who cherish liberty; a protection for vulnerable minorities against the tyranny of majorities; and a remedy for everyone against the misuse of public powers.

It engages the executive, the legislature, and the judiciary in securing those rights and providing remedies. Unlike most other constitutional systems, the Human Rights Act prevents the unelected judiciary from nullifying Acts of Parliament that violate our basic constitutional rights. Instead it enables the courts to make declarations of incompatibility with Convention rights, leaving it to the Government and Parliament to decide whether to amend the offending statute or to await a ruling by the European Court of Human Rights. In that way it is more democratic and less judge-based than in most other countries.

The Human Rights Act is not a panacea, but it has worked well in many important ways, not well recognized in this country. Our judges have been conscientious and careful in interpreting and applying its provisions and in not making political decisions. Their judgments now have great influence within the European Court of Human Rights, across Europe and the common law world. Ministers and civil servants now have to ensure that their decisions are compatible and the Parliamentary Joint Committee on Human Rights on which I serve, calls Ministers to account if they fail to do so. There is a deep-rooted culture of justification now required for law-making and administrative decision-making that is the envy of other countries in Europe and beyond, as is the work done by our independent judiciary.

The Human Rights Act is buttressed by the devolution Acts which require that the legislative and executive branches of government in Scotland, Northern Ireland and Wales comply with the rights guaranteed by the Convention when performing their public functions. The scheme ensures that everyone in every part of the United Kingdom enjoys equal protection of basic rights and freedoms which are part of our birthright and common humanity. The scheme is designed to respect the different legal, political and cultural traditions of the countries of the

United Kingdom: diversity and unity combined: *unus e pluribus* within our quasi-federal system.

But although the scheme works well for judges and lawyers and civil society, and for the devolved institutions, it does not command widespread public confidence. The political commitment to an enduring system is fragile and uncertain because of constant challenges to the legitimacy of the Human Rights Act. From its birth, powerful sections of the British media have attacked the Human Rights Act on a daily basis, because they oppose its protection of personal privacy against media intrusion on private lives and because they wish the UK to withdraw from the European Convention and the European Union. Senior Ministers and former Ministers also attack the Strasbourg Court, refuse to abide by the binding European judgments on prisoners' voting rights, and say they wish to tear up the Human Rights Act. Sir Nicolas Bratza, while President of the Strasbourg Court, was demonised as a "foreign" judge because he is the son of a distinguished Serb violinist, his matrilineal descent from Lord Russell of Killowen not making him sufficiently "British" to pass muster with the editors of *The Daily Telegraph* and *The Daily Mail*.

It is the context in which every non-governmental organisation within UK civil society who gave evidence fears that our report will be used by a future Conservative Government as a pretext for replacing the Human Rights Act with a "British" Bill of Rights and withdrawing from the European Convention and the European Union. Those fears are not fanciful and I share them with some of my colleagues.

I have been privileged to appear as an advocate in the European Commission and Court of Human Rights in many cases for more than forty years. I admire the system and wish that the governments of Europe would give it the resources it needs to be able to eliminate the crippling backlog of pending cases. The Convention is the jewel in the crown of the Council of Europe, but the jewel is tarnished for lack of proper support from governments, including our own.

Many of the criticisms made of the Strasbourg Court are unfair and misconceived, deriving from a narrow theory of judicial interpretation that is literal rather than purposive, and static rather than dynamic, seeking to confine the reach of the Convention to the world of sixty years ago. The Convention and the Court serve the needs of the 800 million citizens of Europe in upholding the rule of law and respect for human rights in all 47 countries. I hope that one day the UK will once again be able to resume its rightful place as champion of the Convention system.

I join the majority in supporting the recommendations in this important, well-informed and wise report because they are loyal to our terms of reference in building upon, rather than weakening, what we have achieved in the Human Rights Act and through our membership of the European Convention system.

The weakness in the Human Rights Act is that it depends upon the Convention to define our rights and freedoms. Instead of asking whether our *constitutional* rights have been infringed, the Human Rights Act asks whether our *Convention* rights have been infringed. That is not the way it works in the rest of Europe and the common law world where written constitutions protect the universal civil and political rights anchored in international treaties. Instead of bringing rights home, the Human Rights Act has an alienating effect, especially among those for whom "Europe" is a dirty word.

That is why change would in principle be desirable. I do not accept that the present system is incapable of improvement, or that fears of the misuse of our report should lead us to oppose any change, as though further advances are impossible. Our report is a fine contribution to the coming debate and its recommendations have been fashioned with great care.

I join the majority because it calls for a restatement of civil and political rights and liberties in terms that respect our constitutional and legal heritage, so that we approach European law *through* UK law rather than *round* UK law.

I join the majority because, loyal to our terms of reference, we are committed to the proposition that any move towards a UK Bill of Rights would have to ensure that there was no less legal protection than is given by the present scheme.

I join the majority because we emphasise so strongly in the report that any move towards a UK Bill of Rights would need to be made carefully and sensitively after wide public consultation within each country of the UK and across the nation as a whole, in the context of wider constitutional debate that is bound to occur whatever the outcome of the Scottish independence referendum and the debates in Northern Ireland about whether additional protection is needed there.

I join the majority because, respectfully but firmly, we request our political governors and future governors to remember that fools rush in where angels fear to tread.

An Aspect of Strasbourg Court Reform

by Anthony Speaight QC

When the Commission provided its interim advice to the Government on reform of the European Court of Human Rights, there was a side letter in which the Chair mentioned a number of further ideas. He said that we might wish to consider some of them in greater depth later. This paper sets out a purely personal view of mine on one possible such area.

The outcome of the UK Chairmanship of the Council of Europe

Thinking on future reform in relation to the Strasbourg Court is now inevitably affected by the outcome of the UK's Chairmanship of the Council of Europe, as embodied in the Declaration at the end of the Brighton Conference in April 2012. It is hard to resist the judgment that this revealed little prospect of significant change.

One suggestion which the Commission made was that there should be enhanced screening of applications so that the Court should in future be called upon to address only a limited number of serious or important cases. The UK Government is understood to have proposed tighter admissibility criteria,[1] but no such proposal appeared in the Brighton Declaration issued at the end of the Conference. Nor was there any mention in the Declaration of the Commission's proposal for the ending of the "just satisfaction" financial awards.

Perhaps the most significant setback to the UK's proposals was in respect of the principle of subsidiarity, which was understood to involve less interference by the Court in the detail of national affairs. The UK draft text read:

> "the transparency and accessibility of the principles of subsidiarity and the margin of appreciation should be enhanced by their express inclusion in the Convention."[2]

The leak of the draft text provoked impassioned opposition from lobby organisations, who said that the proposal would undermine the Convention by giving priority to the margin of appreciation.[3] This campaign seems to have had some impact. In the end paragraph 12(b) of the Declaration from the Brighton Conference read:

> "... for reasons of transparency and accessibility, a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as

[1] Draft text published in *The Guardian* on 28 February 2012 at paragraphs 21 and 23(c).
[2] Same draft, paragraph 19(b).
[3] Joint statement dated 20 March 2012 by Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre, the Helsinki Foundation for Human Rights, Human Rights Watch, INTERIGHTS, the International Commission of Jurists, JUSTICE and REDRESS.

> developed in the Court's case law should be included in the Preamble to the Convention."

The difference in wording may appear small, but it was significant. Firstly, gone is the statement that subsidiarity and the margin of appreciation should be enhanced; instead the Court's existing case law gets approval. Secondly, mention of a principle in the Preamble gives it less prominence and potential effect than in the body of the Convention.

The entire subsidiarity proposal was from the start essentially symbolic, although that is not to say that, if adopted, it would have been unimportant. The symbolism of its defeat is equally real. The outcome means that the cause of subsidiarity, in the sense of a less interventionist Court, has, if anything, gone backwards. For the Brighton Declaration gave even less importance to subsidiarity than had the Declaration from the previous governmental conference at Izmir, which had stated:

> "The Conference,
>
> 2. ... invites the Committee of Ministers to apply fully the principle of subsidiarity, by which the states Parties have in particular the choice of means to deploy in order to conform to their obligation under the Convention."

The conclusion to be drawn from the outcome of the UK Chairmanship seems to be that no significant change is likely to be achievable through the route of amendment of the Convention. Any such amendment requires unanimity amongst 47 countries. The UK initiative during its Chairmanship was a modest, but nonetheless worthwhile, package of reforms, pursued with real enthusiasm by ministers from both parties in the Coalition Government. The disappointing result inevitably is leading thoughts to turn to other directions.

Is there any alternative route to reform?

Following the Brighton Declaration, various directions of travel have been suggested by those who regard the Strasbourg Court as having developed a jurisprudence of excessive interventionism; but in general the ideas are unpromising.

One hope in recent years has been that the Court, which has some reputation as a politically attuned institution, would respond sensitively to the growing criticism of its activism. However, the last year has seen a string of decisions which have pushed the interpretation of the Convention further than ever before in the development of new situations held to amount to violations.

One suggested way forward is that the UK should simply decline to implement decisions which Parliament finds objectionable. This, in effect, is the course which currently seems to be the preference of many MPs in respect of prisoner voting. A more sophisticated version of essentially the same idea proposes some procedure for the implementation of Strasbourg

decisions to be subject to a free vote in Parliament. However, all such suggestions run flatly contrary to the treaty obligation in article 46(1) of the Convention:

> "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."

There is some scope for debate as to whether contracting states have undertaken any treaty obligation to abide by the "interim measure" orders issued by the Strasbourg Court to forbid deportations pending the full consideration of a case by the Court;[4] but no scope for debate at all in relation to final judgments.

Therefore, for the UK or any other state deliberately to resolve not to implement a final judgment would involve a conscious decision to break a treaty. It is often said that other countries so frequently fail to implement judgments that the UK would be doing no more than joining in with the crowd. But the assertion that other countries ignore judgments is deceptive. It is correct that at the end of any year most countries will have a number of unimplemented judgments; but these will normally be instances of tardiness in compliance, not outright refusal. Sometimes the tardiness lasts many years, as, indeed, has the UK's inactivity in respect of the *Hirst*[5] decision on prisoner votes which was delivered as long ago as October 2005. But this is qualitatively different from conscious defiance. It is often said that it would infringe "the rule of law" to disregard the finding of an international court. This may not express for some people the real reason for feeling uncomfortable about a conscious policy of non-implementation, since the Court can itself be seen as threatening the rule of law by its undermining of the principle of legal certainty.[6] The real objection surely is that, as a matter of sound foreign policy, it is in our national interest to encourage other countries to abide by their treaty obligations, and that we can hardly do that if do not stick to our own undertakings.

In earlier times a possible option would have been a decision by the UK to end acceptance of the Court's jurisdiction on individual petitions. Originally this jurisdiction was optional, and was not accepted by the UK until 1966. However, the possibility of continuing to be party to the Convention without accepting the Court's role ended in November 1998 with the entry into force of Protocol 11. Today the only way in which the UK can bring to an end the treaty

[4]By rule 39 of the Rules of Court a chamber or the President may "indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it." In *Olacchea Cahuas v. Spain* [2006] the Court held that a state which did not comply with such an "indication" would breach article 34 under which parties undertake "not to hinder in any way the effective exercise" of the right of individual petition. The correctness of the decision can be doubted, especially in any case where the receiving country will provide facilities for an individual to post and receive communications with the Court.

[5]*Hirst v. UK* [2006] 42 E.H.R.R. 41.

[6]In his magisterial book *The Rule of Law* Tom Bingham identifies eight characteristics or principles of the rule of law, of which the first is: "The law must be accessible, and so far as possible intelligible, clear and predictable."

obligation to abide by Court decisions is to exercise the right to give 6 months notice of withdrawal from the Convention.[7]

Another possibility which has occurred to some critics is to seek a manner in which to challenge the Court for exceeding its jurisdiction. Dominic Raab MP and Jonathan Fisher QC are amongst those who have cogently argued that the Court has exceeded its proper function.[8] Challenges on the ground of *ultra vires* are the daily meat and drink of administrative lawyers in the UK domestic context. Might some such challenge be mounted to the Strasbourg Court for an excess of powers? It is not easy to see how. Within the Convention and Council of Europe architecture the Court is supreme: there is no appellate level. In theory the Court might be invited voluntarily to submit to the jurisdiction of the International Court of Justice for a hearing of a complaint, possibly focussed on some particularly ground-breaking judgment, that it had exceeded its powers. But the Strasbourg Court would have a threshold argument to deflect such a challenge to its jurisdiction, since its powers extend to determining its own jurisdiction.[9] Even if there is an interesting academic argument that an irrational finding of self-jurisdiction would be invalid, the prospect of curbing the activism of the Court by challenge in any international forum must be assessed as extremely remote.

Another idea which has been canvassed is that the UK should give formal notice of withdrawal, and then immediately re-apply making a reservation in respect of a few matters. This idea was briefly considered by Sweden in the 1980s following a Court decision about some aspect of administrative justice which created problems for that country. This route could, indeed, provide a potential solution to the prisoner voting issue, as it would be open to the UK, if re-applying, to make a reservation in respect of its Representation of the People Act. But a reservation can apply only in respect of a law currently in force in a state's territory:[10] so it is not easy to see how the UK could fashion a reservation to escape from future adverse decisions on, say, deportations. Furthermore, there is no right of withdrawal under article 58 during the first 5 years of membership, so if the UK were to rejoin with one reservation after a nominal denunciation, there would be no chance to repeat the process in the event of future issues for at least 5 years.

Therefore, one hears voices beginning to argue that the UK faces a stark choice between, on the one hand, accepting an ever-increasing range of unforeseen and unagreed limitations on its democratic sovereignty without any predictable boundary, and, on the other, withdrawal

[7]This is technically called denouncing the Convention. The right to denounce is in article 58.

[8] Dominic Raab MP, *Prisoner Voting, Human Rights & the Case for Democracy* (London: Civitas, 2011); Jonathan Fisher QC, *Rescuing Human Rights* (London: The Henry Jackson Society, 2012).

[9]By article 32: "In the event of dispute as to whether the Court has jurisdiction, the Court shall decide."

[10]Article 57 states: "Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article."

from the Convention. This position was, for example, argued[11] with cogency by Nick Herbert in his Kingsland Memorial Lecture on 27 November 2012. Is there any other avenue open by which to escape from this dilemma?

NAFTA's practice of ministerial interpretations

A possible approach may be suggested by observing a feature of the North American Free Trade Agreement ("NAFTA").[12] This is an agreement which was made in 1994 between the governments of Canada, Mexico and the United States. Its purpose is to create a trade block of the three countries, in which tariffs would be progressively eliminated, and non-tariff barriers reduced. Chapter 11 created a scheme whereby private investors could seek recompense from signatory governments for breach of the free trade principles in the treaty. The mechanism involved rules-based arbitrations for the resolution of such disputes. Another part of the NAFTA institutional structure, which is called the Free Trade Commission, is a meeting of Cabinet level ministers from the three countries.

The NAFTA treaty accords to the ministers sitting in this Commission power to direct how the arbitral Tribunal is to interpret and apply the Treaty. Article 1131 states:

> "(1)A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
>
> (2) An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

Thus the governments have a quick and easy route to accomplish what would otherwise require the lengthy business of treaty amendment, entailing ratification procedures in each state.

The exercise of this power was well illustrated by the saga of the *Pope & Talbot* case. The background was a Softwood Lumber Agreement in 1996 between the US and Canada under which Canada agreed to limit its softwood exports to the US. The claimant investor was a company based in Oregon which owned sawmills in British Columbia. It asserted that an export quota imposed by Canada affected it unfairly, and that it had been denied a hearing and reasons. The provision in NAFTA on which it based its claim was in very general language:

> "1105 (1) Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

[11]Text of lecture is available through the Policy Exchange website at: http://www.policyexchange.org.uk/.

[12]I am grateful to Professor Gus Van Harten of Osgoode Hall Law School in Toronto for the information which he provided to me in relation to NAFTA, but am solely responsible for any errors in my understanding of it.

For many years there has been a concept of fair treatment in customary international law,[13] but historically its requirement have not been demanding, so that only grossly unfair treatment would be considered to amount to a breach. *Pope & Talbot* argued that article 1105 included other, much broader standards, which it claimed could be found in other international law sources, including other treaties. In an interim award the arbitral Tribunal accepted this submission, adopting what became termed as an "additive theory". The governments were concerned at this development, since the scope for adding new requirements and higher standards, in addition to the customary historical requirement, could have had far-reaching implications.

Accordingly at a meeting in July 2001 the Free Trade Commission unanimously adopted a formal interpretation under article 1131 stating that article 1105 did not require treatment in addition to that required by the customary international law minimum standard. The *Pope & Talbot* proceedings were still ongoing. So the issue arose whether the Tribunal should proceed to an award of damages on the basis of its own interim award, or whether it should accept the article 1131 interpretation as, in effect, overriding it. The Tribunal adopted the latter course, and made an award of damages at only a modest level.

Such formal interpretations have not been frequent, but the Commission has on occasions adopted a different course in order to steer arbitral decisions. This has been by the making of non-binding recommendations. There is no provision in Chapter 11 for such a procedure as part of the dispute resolution mechanism: it is simply a practice which the Commission itself has chosen to adopt. On at least one occasion a recommendation has been made without unanimity. This occurred in 2003 when the US and Canada alone made a recommendation on a procedural matter. NAFTA provides that the Commission shall take decisions "by consensus, except at the Commission may otherwise agree."[14] It is understood that in practice arbitrators do not regard themselves as necessarily bound by such informal recommendations but do certainly accord some weight to them.

Thus the NAFTA experience illustrates senior government ministers of the state parties to a treaty using both formal procedures and informal recommendations to shape the interpretation given to open-textured wording in articles of the treaty. Such action has not always required unanimity. In the case of the formal interpretations, they have been accepted as having retroactive effect.

It may be of interest that a similar arrangement is understood to be currently under discussion in Europe. The European Union and Canada are currently negotiating a free trade agreement which will include provision for investors to claim compensation from contracting

[13]The classic statement of the international minimum standard is that in the *Neer* case in 1926. The General Claims Commission of the US and Mexico described the test as treatment amounting to "an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would recognise its insufficiency."
[14]Article 2001(4).

parties, and for a tribunal to adjudicate on such claims. Informal indications are that this may envisage a Commission or Committee authorised to adopt interpretations binding on the tribunal, albeit possibly not with retrospective effect.

The scope for ministerial interpretations in the Convention

The NAFTA arrangement might be able to be adopted in respect of the European Convention on Human Rights. The institution which provides general overall supervision of Council of Europe activities is the Committee of Ministers. It is also charged with a particular role in respect of the Convention – namely, responsibility for supervising the execution of judgments. By article 46(2) of the Convention:

> "The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

Supervision of execution does not, as such, extend to guidance on the meaning of the Convention. It could embrace some exercise of discretion as to the nature and extent of implementation, and it may be that the Committee of Ministers should be willing to exercise a broader independent judgment than hitherto. But there may be only so far that such discretion, taken in isolation, could properly go.

However, the role of the Committee of Ministers under the Convention is not confined to supervising execution. For article 54 states:

> "Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe."

That Statute confers on the Committee of Ministers a very wide role. Article 15(a) provides:

> "On the recommendation of the Consultative Assembly or on its own initiative, the Committee of Ministers shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters."

Therefore, it would be fully within the competence and proper activity of the Committee of Ministers for it to adopt position statements as to what the general principles in the Convention should in more practical terms involve.

The Committee of Ministers does, in fact, frequently adopt position statements on various contemporary issues. In the last 12 months these have ranged from academic freedom through the role of prosecutors to match-fixing in sport. Sometimes such positions are expressly recommendations to member states: in that event they fall under a separate article of the statute, requiring a unanimous vote of those represented and voting. A more general statement of position or policy would seem likely to fall into a default category of resolutions, for which the requirement is a two-thirds majority of the representatives casting a vote, and a

simple majority of the member states.[15] Therefore, as a matter of the Statute, it would appear to be within the competence of the Committee of Ministers to adopt by a two-thirds majority vote a recommendation on the meaning and interpretation of the Convention. Such a resolution would not, of course, be binding on the Court: it would merely be for the Court's guidance in so far as the Court chose to pay attention to it.

Nonetheless, a consequence of the Court's "dynamic" jurisprudence is that the Court ought to pay some significant attention to such an expression of opinion – and that is quite apart from the political weight of such a declaration. For a feature of the Court's approach is the according of weight to what it regards as a European consensus. Such a consensus does not have to be a unanimous policy throughout member states; there seems to be some tipping point at which the Court will decide that the practice of a significant number of states is one which must be mandatory for all. For instance, despite a series of previous cases in which the Court had rejected the suggestion of a right for post-operative transsexuals to have their birth certificates altered to reflect a change of gender, in 2003 it held that the Convention did create such a right by reason of a continually emerging European and international consensus.[16]

On some occasions a document from another Council of Europe institution has furnished the evidence of the European consensus. For instance, in *Oneryildiz v. Turkey*,[17] which concerned a fatal accident caused by a landslip of a refuse tip, the Court cited a Committee of Ministers recommendation on the distribution of powers and responsibilities between central authorities and local authorities with regard to the environment. In *Dickson v. UK*,[18] in which it was held that a prisoner serving a life sentence for murder was entitled to facilities for the artificial insemination of his wife, the Court was influenced by a set of recommended prison rules which the Committee of Ministers had issued. In *Sorensen v. Denmark*,[19] in which Denmark's laws on the closed shop were found to violate the Convention, the Court relied on findings of the European Committee of Social Rights, a group appointed by the Committee of Ministers.

Therefore, it would seem to be within the competence of the Committee of Ministers to issue non-binding recommendations as to the requirements of the Convention; and the jurisprudential approach of the Court ought to lead it to accord weight to any such recommendations as an expression of a European consensus. In that context it becomes easier to see how, if the Court were to ignore such expression of a European consensus, the Committee of Ministers might exercise its discretion to take no action to encourage implementation by a member state of a Court decision.

[15] Statute article 20(d).
[16] *Goodwin (Christine) v. UK*, [2002] 35 E.H.R.R. 447.
[17] *Oneryildiz v. Turkey*, [2005] 41 E.H.R.R. 20 at paragraph 59, citing recommendation R (96)12.
[18] *Dickson v. UK*, [2008] 46 E.H.R.R. 41, citing the European Prison Rules which had been adopted by Committee of Ministers resolution 73.5.
[19] *Sorensen v. Denmark*, [2008] 46 E.H.R.R. 29.

Such a development of practice could occur without any need for an amendment to the Convention. It would, of course, require a substantial degree of support amongst ministers; but it would not require unanimity of all 47 member governments and parliaments. It does not depend on a change of heart by the members of the Court: instead, it depends on the will of democratic politicians, who are likely to be more in touch with popular feelings.

Fostering sufficient support amongst ministers may prove a substantial challenge. But arguments of high principle are available. Any national constitution which confers power on a court to invalidate laws held to be in contravention of a constitutional right will also contain some machinery by which the democratic will can prevail over the court. This may require a constitutional amendment by an enhanced majority in a parliament, or approval by a number of different institutions. In Canada democratic override can be achieved by a legislature declaring in a statute that it is being enacted "notwithstanding" a right in the Charter of Rights and Freedoms;[20] and on a number of occasions provincial and territorial legislatures have enacted statutes containing such a "notwithstanding" clause. In the United States, despite demanding procedural requirements, the constitution has been amended on a number of occasions. By contrast, the rights set out in the European Convention of Human Rights have never been amended, and it is inconceivable that they ever would be.

Comparison with the European Union also instructive. The Lisbon Treaty introduced into the procedures of the EU the concept of subsidiarity reviews. The European Court of Justice now has jurisdiction to review a proposal on the ground of infringement of subsidiarity: such a review must be undertaken if a challenge is made supported by 25% (or in other cases 33%) of the parliamentary voting strength of the EU Member States. Work is also under way in implementing a procedure which will provide an external review of the European Court of Justice: this will be by the Strasbourg Court upon the accession of the EU to the European Convention on Human Rights. An institution as free from any checks or balances as the Strasbourg Court is rare in the democratic world.

So there is a democratic deficit in the working of the Convention. If a substantial number of the governments of Europe could be persuaded of the moral case for the desirability of democratic reform, the practice of ministers in NAFTA might just show the way to achieve it.

[20]Canadian Charter of Rights and Freedoms, s. 33(1).

Devolution Options

by Anthony Speaight QC

A feature of many submissions to us from those opposed to, or lukewarm on, a UK Bill of Rights is that there would be great difficulties in such a project owing to the devolution dimension. This paper is a personal attempt to explore a little further than the main report the nature of the options which may, in fact, be available.[1]

One approach which we have encountered tends to suggest that there are almost insuperable difficulties in any project for a UK Bill of Rights owing to the lack of support from devolved institutions. The argument tends to be presented on these lines. Recognition of the importance of Convention rights is a feature of the devolution settlement, since in all three devolution statutes, compatibility with Convention rights is one of the limits on the competence of the devolved institutions. Any new Bill of Rights which contained additional rights would by its nature introduce additional constraints on the powers of the devolved institutions. It would be contrary to the Sewel Convention for the UK Parliament to modify the devolution statutes or to introduce any new restrictions on devolved institutions' powers without the consent of the devolved legislatures. It is apparent that there will be opposition from at least one of the devolved legislatures to any draft UK Bill of Rights. Therefore, so it is argued, in political terms a UK Bill of Rights is not possible. An example of this viewpoint may be found from the Editor of the Scottish Human Rights Journal:

> "It is my view that it is now clearly understood that the Scottish Parliament would not give consent to the repeal of the Human Rights Act and its replacement by a weaker UK Bill of Rights. Accordingly, I cannot see a UK Bill of Rights in the foreseeable future, if ever."[2]

A variant line of thinking is that which regards it as an undesirable inevitability of any Bill of Rights project that it would end up with different rights in different parts of the UK. JUSTICE's assessment to us was:

> "We are extremely concerned that the current legal and political climate in the UK would make agreement on a system which reflects – and respects – the devolution settlement, impossible. At a minimum, we consider that any proposals for change which depart from the substantive and procedural rights in the HRA 1998 would provoke very different public responses in Scotland, Wales and Northern Ireland; these different approaches would be politically divisive and far from simple to

[1] Although the views expressed are purely my own, I am very grateful to Professor Sir David Edward QC for assistance on several parts of this paper.

[2] Issue 56, February 2012.

> resolve. At worst, it may be impossible to secure the agreement of the devolved assemblies to any decision which would establish a UK-wide bill of rights and could ultimately lead to four separate models."[3]

A more positive view was expressed by the Joint Committee on Human Rights:

> "We agree with the Government that the UK's devolved governance arrangements do not preclude a UK Bill of Rights from being drawn up. We also agree with Professor Dickson that having Bills of Rights at both the national and the devolved levels is desirable."[4]

However, the Joint Committee added little by way of justifying those positions. The purpose of this paper is, in line with the Joint Committee's conclusions, to seek to demonstrate, firstly, that there is nothing inherently undesirable about different rights in different parts of the United Kingdom, and, secondly, that there are a number of options compatible with the Sewel Convention.

Rights charters in multi-level systems of government

The instinctive reaction of many people is that of its nature a charter of rights ought to operate at national level: any such a charter is likely to be both an important feature of a country's constitution, and a statement of the values which give the country identity. Nonetheless, the Commission's researchers have revealed that in many parts of the world there are bills or charters of rights at provincial or state level.

In Canada there is a "Canadian Charter of Rights and Freedoms" contained in the Constitution Act 1982: this has effect at all levels, both federal (i.e. national) and provincial, though there are a small number of provisions that afford constitutional rights to only certain groups in certain provinces, such as language rights. There are two other documents, the Canadian Bill of Rights which was passed in 1960, and the Canadian Human Rights Act, which apply to the federal government but not to the provinces and territories. In addition the provinces of Alberta, Quebec and Saskatchewan have enacted statutory bills of rights,[5] while the other provinces and the devolved territories generally have enacted human rights codes. The content of these bills of rights and codes varies. For instance, only Quebec's contains economic and social rights; the Canadian and Alberta bills of rights mention freedom of religion and freedom of the press, whilst Saskatchewan's does not. The human rights codes and the Canadian Human Rights Act generally include only equality and anti-discrimination rights. Thus there is asymmetry in almost every respect.

[3] JUSTICE, Discussion Paper Response, p. 18.
[4] "A Bill of Rights for the UK", August 2008, 29th report of session 2007-8, para. 110.
[5] Alberta Bill of Rights (1946), Quebec Charter of Human Rights and Freedoms (1975) and Saskatchewan Human Rights Code (traceable back to 1947).

Australia has no catalogue of rights in the federal constitution, which is contained in the Commonwealth of Australia Constitution Act 1960, and the Commonwealth Parliament has never enacted a bill of rights.[6] However, there are a number of provisions which have been relied on in a manner which has some similarities to rights legislation. For instance, a power for the Commonwealth to make laws for the compulsory acquisition of property on just terms has been held to involve a right to compensation; there is a guarantee of trial by jury; and there is a prohibition on the establishment of a national religion. Those provisions limit the scope of the Commonwealth Parliament, but do not affect state legislatures. There is one provision which limits state legislatures and not the Commonwealth, namely a prohibition against enacting laws which discriminate against those residing in other states. In 2006 one state, Victoria, enacted a Charter of Human Rights and Responsibilities. The Australian Capital Territory has enacted a Human Rights Act. The rights in these two devolved instruments do not entirely match: only the Capital Territory's contains a right to compensation for wrongful conviction, and only Victoria's guarantees property rights. The other five states have no such documents.

In Germany and Austria, each of the Länder has its own constitution. Many of them, but not all, include a detailed chapter setting out the rights of individuals.[7]

Spain's national constitution, which has been in force since 1978, contains a chapter on fundamental rights, which applies throughout the country and at all levels of government. In recent years some 17 "autonomous communities" have been established with their own Statutes of Autonomy. Some of these statutes, such as the Catalan and Valencian, contain their own charters of rights. Others, such as the Basque, do not. The Catalan and Valencian Statutes are similar in that they both contain socio-economic rights, which, broadly speaking, the national constitution does not. However, the content of the additional rights is expressed in quite different language, and, to some extent, seems to be to slightly different effect: for instance, the Catalan statute contains a reference to rights of minors, whereas the Valencian does not mention rights of the child. In 2010 the Spanish Constitutional Court held that some of the Catalan Statute's provisions, including linguistic rights were unconstitutional.

While, therefore, there may be arguments in terms of consistency for identical rights to apply throughout a nation state, there are many examples of countries where rights are asymmetrical, with distinct rights documents operating at state or provincial level.

[6]In respect of Australia and Spain, I am grateful for the research undertaken for the Commission by John Adenitire, postgraduate student at Durham University.

[7]Prof. Dr. Ulrich Karpen, "Subnational Constitutionalism in Germany"(paper presented at the Center for State Constitutional Studies Conference on Subnational Constitutions and Federalism: Design & Reform, Bellagio, Italy, 22 March 2004), available at: http://camlaw.rutgers.edu/statecon/subpapers/karpen.pdf.

The emergence of devolved rights in the UK

Whatever the theoretical attraction of a single set of rights throughout a sovereign state, it is becoming increasingly clear that in the UK distinct rights agendas have started to develop in Northern Ireland, Scotland and Wales.

In the case of Northern Ireland there has been explicit and formal recognition of the desirability of a distinct Northern Ireland Bill of Rights. The Belfast/Good Friday Agreement stated:

> "The new Northern Ireland Human Rights Commission... will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the ECHR – constitute a Bill of Rights for Northern Ireland. Among the issues for consideration will be:
>
> the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and
>
> a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors."

The Agreement made provision for recognition of language rights, including duties on the UK Government for the promotion of the Irish language. The Agreement also mandated a Joint Committee of the Northern Ireland Human Rights Commission and the Irish Human Rights Commission to consider the possibility of "A Charter of Rights for the Island of Ireland", which would have declaratory effect only.

In the case of Scotland and Wales there seems to have been no single moment at which a choice has been made to develop a distinct human rights policy: rather, it has emerged gradually from various decisions and initiatives.

The Scottish Parliament enacted the Scottish Commission for Human Rights Act 2006. It established the Scottish Human Rights Commission, with the duty to promote human rights. For this purpose "human rights" are defined to mean not only the Convention rights but also other human rights contained in other international documents ratified by the UK. When the legislation was introduced in the Scottish Parliament (as the Scottish Commissioner for Human Rights Bill), it was accompanied by the Executive and Presiding Officer's Statements on Legislative Competence required by section 31 of the Scotland Act 1998, and to the best

of our belief, the competence of the Scottish Parliament to establish such a body or to vote the money to finance it has not been challenged.

More recently, the devolved institutions have taken action in the field of social rights. The Scottish Parliament passed the Patient Rights (Scotland) Act 2011 and the Scottish Government has this year consulted on a draft bill that seeks to place a duty on Scottish Ministers to have due regard to the rights and obligations contained in the United Nations Convention on the Rights of the Child in the exercise of their functions.

The Welsh institutions have also enacted legislation on rights. The Rights of Children and Young Persons (Wales) Measure 2011 imposes a duty on Welsh Ministers to have due regard to the rights and obligations contained in the United Nations Convention on the Rights of the Child in the exercise of their functions.

In 2011 the Welsh Assembly passed another measure relating to an area which has been linked with rights, namely language. The Welsh Language (Wales) Measure 2011 seems to have achieved a wide degree of consensus in Wales as a solution to what was for many years a vexed topic. Whilst it is not written in the language of "rights" it does establish rights by creating enforceability of "standards."

In March 2012 the Welsh Government launched a consultation on creating a separate legal jurisdiction for Wales. This could potentially involve a distinct Welsh courts structure with its own senior judiciary and a distinct Welsh legal profession. It would also be likely to entail a recognition of Welsh law as something different from, even if very similar to, English law, in the same way that Northern Ireland's law is distinct from, although similar to, English law. It is clearly possible that the recognition of a separate Welsh legal jurisdiction would be accompanied by the devolution to the Welsh institutions of competence in respect of the administration of justice and criminal and civil law, which currently remain functions of the UK Government. It seems realistic to consider future options for a UK Bill of Rights bearing in mind the possibility of such a development.

It follows from our discussion above that this development of laws and policies in respect of rights in the devolved countries of the UK can be seen as paralleled by arrangements elsewhere in the world. There has been no adverse comment on this development, and several consultees have expressly welcomed it. For instance, the Faculty of Advocates told us:

> "We suggest that allowing individual devolved legislatures to develop appropriate ways of meeting these needs [victims' and children's rights] is a system that is working well and the most effective and suitable approach."

In chapter 12 the Commission concluded that, if there were to be a UK Bill of Rights, it should be open to the devolved legislatures to legislate within their devolved competence for specific additional rights within their jurisdiction. Consideration of future rights protection in the UK should take account of the reality that Northern Ireland, Scotland and Wales will each

have their own laws on rights and that these laws will not always match either each other or the laws at national level.

Is human rights a Westminster or a devolved matter?

The question in this sub-heading is, as noted in chapter 6, one on which there is an ongoing debate. It is a question to which there is not an easy "Yes" or "No" answer because the question deceptively wraps up a number of different questions, each with their own answer.

Some preliminary propositions are plain. At the level of legal competence, it is not in doubt that the Westminster Parliament can lawfully and effectively change the Human Rights Act and all the devolution statutes in any way it might choose. On the other hand, at the level of political reality, it seems unlikely that the Westminster Parliament would choose to do so given the existence of the Sewel Convention. That Convention is now embodied in a Memorandum of Understanding and Supplementary Agreements dated September 2012 between the UK Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee. It states at paragraph 14:

> "The UK Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature."

The original formulation of the Convention was in very similar wording in the speech of Lord Sewel, a Scottish Office Minister, on the second reading of the Scotland Bill in 1998:

> "...as happened in Northern Ireland earlier in the century, we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament."[8]

The terms of the convention leave somewhat open the question of what is, and what is not, a "devolved matter" not least because the Scotland Act 1998 did not create, as such, any concept of a "devolved matter": it rather identified "reserved matters", namely, those excluded from the Scottish Parliament's competence. Nevertheless, although the three devolution statutes use different terminology, the shorthand expressions "devolved matter" and "Westminster matter" are convenient and are used in what follows.

Arguably, a further unwritten convention may have emerged in the light of the negotiations between the UK Government and Scottish Government that took place prior to enactment of the Scotland Act 2012. This Convention (if it exists) would be that, not only should

[8]HL Debates, vol. no. 592, part no. 191, 21 July 1998, col. 791.

Westminster not legislate to constrain the competences of the Scottish institutions without their consent, but also that it should not enlarge them without at least prior negotiation, and possibly consent.

Two aspects of human rights are dealt with expressly in the devolution statutes. One is the Human Rights Act 1998. The Scotland Act expressly provides that the Scottish Parliament has no competence to "modify" the Act of 1998,[9] and the Northern Ireland Act similarly specifies the Human Rights Act as an entrenched statute which cannot be modified by the Northern Ireland Assembly.[10] In the case of Welsh devolution the outcome is the same, since modification of the 1998 Act is not within any of the areas of devolved law-making power.

A second aspect of human rights which is covered clearly by the statutes is adherence to the European Convention on Human Rights. Under both the Scotland Act and the Northern Ireland Act "international relations" is a Westminster matter. Since the Convention is a treaty, all questions of the acceptance of protocols, attendance in Council of Europe institutions etc. must likewise be Westminster matters. Similarly the decision to accept the Lisbon Treaty, which incorporated the EU Charter of Fundamental Rights, was, and was exclusively, a Westminster matter, as would be any renegotiation of any EU treaty.

But it does not necessarily follow from the fact that those two aspects of human rights are Westminster matters that the whole topic of human rights or rights protection is a Westminster matter. The enactment of rights in relation to a specific area of administrative activity can be viewed as no more than a facet of the discharge of governmental function in that area. There is considerable force in an observation in JUSTICE's report *Devolution and Human Rights*:

> "it has been suggested that to ask whether human rights are a devolved matter is like asking whether fairness and consistency are devolved matters, and that human rights are values, not fields of public administration." [11]

The Rights of Children and Young Persons (Wales) Measure 2011 illustrates this point. This provides:

> "1. From the beginning of May 2014, the Welsh Ministers must, when exercising any of their functions, have due regard to the requirements of
>
> (a) Part I of the [United Nations Convention on the Rights of the Child]"

This, in effect, sets a standard and a mode of discharge for the exercise of administrative functions. It seems natural to regard it as part of the proper exercise of a devolved law-making function for a legislature which has competence in respect of social policy and

[9] S. 29 and Sch. 4.
[10] Ss. 6(2)(f) and 7(1).
[11] February 2010, para. 73.

children's care. The logical corollary is that it would be within the competence of the devolved institutions to adopt a statement of rights, if they wished, in a single charter or bill of rights, across the whole range of devolved functions (although not, of course, beyond devolved functions).

This conclusion is reinforced when one observes that, whilst international relations is expressly a Westminster matter, both the Scotland Act and the Northern Ireland Act state that "observing and implementing international obligations under the Human Rights Convention and obligations under EU law"[12] is not reserved to Westminster.

It may be objected that enacting a Bill of Rights is a constitutional matter, and, therefore, inherently something which should be for Westminster. Such a line of argument might have weight within a legal system in which a separate category of constitutional law was recognised and given an elevated status. But that is not the case with the law of any part of the UK. There is no special "constitutional" category of legal subject matter. The mere fact that rights protection has a constitutional element does not deprive the devolved legislatures of any aspect of competence which they would otherwise possess.

The opinion of James Mure QC, one of our two Scottish Advisory Panel members, is:

> "Subject to the limits on legislative competence under section 29 (including for example the reservation of equal opportunities at Section L2 of Schedule 5), my own view is that while the Scottish Parliament may not modify the Human Rights Act 1998, human rights are not listed as a 'reserved matter' in terms in of s. 30 and schedule 5, by which reserved matters are defined....The Explanatory Notes to the Scotland Act state that 'entrenchment of the [Human Rights Act] ensures that the Scottish Parliament cannot modify the way in which the European Convention on Human Rights is given effect in UK law. However, it would not appear to prevent the Scottish parliament from enacting legislation to 'bring home' rights under the Convention which do not presently figure in the HRA; to enact legislation to protect other rights regarded as of constitutional importance; or to enact legislation implementing other international rights instruments."

Clive Lewis QC and Reverend Aled Edwards, our Advisory Panel members from Wales take a similar approach:

> "There appears to be a strong consensus in the evidence presented to the Commission [during its visit to Wales and in consultation responses from Wales] that any UK Bill of Rights should not inhibit the legislative competence of the Welsh Government to place its Ministers under

[12]Scotland Act , Sch. 5 Part 1 para. 7, Northern Ireland Act, Sch. 2 para. 3(c).

> obligations to respect additional or different rights than those guaranteed by the European Convention on Human Rights. The evidence presented by the Equality and Human Rights Commission underlines the primary examples where this has already occurred: 'The Welsh Government has given effect to rights within the United Nations Convention on the Rights of the Child via the Rights of Children and Young Persons (Wales) Measure 2011."[13]

Scotland and Wales: the scope of required consent

There are several reasons for rejecting any scheme which involves the modification of, or repeal of, the Human Rights Act in respect of devolved functions in Scotland and Wales without the consent of the devolved institutions. Firstly, it would be completely the wrong direction of travel when so many contemporary factors encourage a more formal recognition of the emerging reality of the quasi-federal nature of the United Kingdom.

Secondly, even supposing it were considered desirable, in a sense it is not an outcome which would really be achievable. Whilst it would in theory be open to the Westminster Parliament (ignoring for the moment the Sewel Convention), to modify or completely repeal the Human Rights Act in relation to Scotland and Wales, it would also be open, and within their competence, for Scottish and Welsh legislatures thereupon to enact their own legislation to almost identical effect, or with enhanced rights, by way of standards in respect of health, education, housing and the many other devolved functions.

Thirdly, in practice any proposal to replace the Human Rights Act with a new Bill of Rights would be likely to trigger the Sewel Convention. For any new Bill of Rights would be likely to contain rights in addition to those in the Human Rights Act. Even if such a Bill of Rights confined itself to the topics covered by the existing Convention rights, in the event that it did so in different language, there might be some risk that in certain respects the new language might be held on some occasion to bear a meaning wider than the European Convention on Human Rights. Therefore, the potential effect would be new constraints on the exercise of devolved functions. If there is indeed a further emerging convention that the powers of the devolved institutions should not be enlarged without prior negotiation or indeed consent, that would reinforce the conclusion that, as a matter of political reality, there should be no change, in any direction, affecting rights protection in respect of devolved functions without the consent of the devolved institution in question.

These considerations underline the desirability of the project for a UK Bill of Rights being the subject of detailed discussion between the Westminster Government and the devolved institutions in some form of inter-governmental conference or constitutional convention. The Commission's conclusion is that some such forum would be the most desirable place to

[13]Clive Lewis QC and Reverend Aled Edwards, Advisory Panel members from Wales, Consultation Paper Response, p. 6.

consider the promotion of a UK Bill of Rights within the context of a wider constitutional review. The natural time for such discussions would be after the Scotland referendum in 2014. Apart from any other consideration, some of the potential benefit of a new Bill of Rights would be lost if it did not extend to devolved activities. One of the arguments for a UK Bill of Rights is that it would strengthen the protection of individual rights in criminal, civil and administrative law, substantive and procedural; yet in Scotland and Northern Ireland (and possibly in due course in Wales) criminal and civil law and the legal system are devolved competences.

If such dialogue leads to agreement with the devolved institutions in Scotland and Wales on a new Bill of Rights extending to devolved functions, then a question would arise as to whether there should be any change to the constraint in the Scotland Act and Government of Wales Act that there is no power to act incompatibly with "Convention rights". One possibility would be to leave this unaltered; another would be to replace "Convention rights" with "constitutional rights" (referring to the rights in the new Bill). There could be arguments either way. An argument against retaining "Convention rights" as the constraint would be the potential confusion of there being in parallel two slightly different sets of rights limiting the exercise of power. An argument in favour of retaining "Convention rights" might be that the constraint, like the other constraint in the same sections relating to EU law, derives from an international obligation of the UK as a whole. This could be a matter for a judgment and agreement at the time, and need not be pursued today.

It may be observed that if the substance of the Human Rights Act were to be repealed as part of any new rights legislation, the definition of "Convention rights" in the 1998 Act ought to be retained, at any rate so long as that remains the competence criterion, since that definition is borrowed by the devolution statutes.

Northern Ireland

The position is somewhat different in the case of Northern Ireland for two reasons. One is that the Belfast/Good Friday Agreement, an agreement to which Ireland is a party, contained a commitment in these terms:

> "the British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR) with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency."

The second limb of that undertaking was fulfilled by the enactment of the limit on the competence of the Northern Ireland Assembly, in the same terms as the fetter which today exists on the Scottish and Welsh legislatures, namely that there is no power to enact laws which are incompatible with Convention rights. But it is arguable that the first limb involved an undertaking to complete the enactment of what became the Human Rights Act which, by April 1998, had completed its Second Reading in the House of Commons.

The second reason in respect of which the position is different in the case of Northern Ireland is that the Belfast/Good Friday Agreement specified in the passage quoted above that the Bill of Rights for Northern Ireland would be enacted as Westminster legislation. Therefore, whilst it would seem to be within the competence, as a matter of Northern Ireland and UK law, of the Northern Ireland Assembly to enact rights protection legislation in respect of devolved functions, which are even more extensive in the case of Northern Ireland than of Scotland, including, as they now do, social security, it should be kept in mind that the explicit intention of the Belfast/Good Friday Agreement is that the Northern Ireland Bill of Rights should be enacted by Westminster.

We have been made very aware from the several meetings which we have had with the Northern Ireland Human Rights Commission and our meetings with other organisations in Northern Ireland of the central role in the peace process of the work towards a Northern Ireland Bill of Rights as a distinct document. We are anxious that nothing we suggest should disturb that process.

Options for a new Bill of Rights

Whilst the above considerations point to the desirability of agreement with all the devolved institutions on any new Bill of Rights, they do not justify the conclusion that in the absence of such agreement the whole project for a new Bill of Rights would be stalled.

In our Second Consultation Paper we offered a number of options for comment:

> "80. One possible model for a UK Bill of Rights in this context is a Bill that might sit alongside the existing Human Rights Act and contain substantially similar provisions and rights to those currently found in Schedule 1 to the Act. Under this model these rights might apply UK wide but be exercisable in respect of reserved matters only. Such an instrument might also include a separate chapter containing rights that applied only to England, as well as a statement that acknowledged the competence of the Northern Ireland Assembly, the Scottish Parliament and the National Assembly for Wales to enact legislation conferring additional rights to meet the particular needs of those countries. Any additional rights passed by the devolved legislatures would, by virtue of the existing devolution statutes, relate to devolved matters only. In the view of some such a model might simply reflect what already happens in practice in respect of rights protection under the devolution statutes.
>
> 81. Another possible model might be a UK Bill of Rights that contained additional rights in respect of Northern Ireland, Scotland and Wales but which would not enter into force in respect of those countries without the consent of the respective devolved legislature."

We received few comments, either favourable or unfavourable, on any of the above ideas, save that there was a strong message from respondents in Northern Ireland as to the importance of a Northern Ireland Bill of Rights as a distinct document.

The Law Society of Scotland said to us:

> "In one sense the current arrangements apply in different ways across the UK and its constituent jurisdictions through the twin track approach of the Human Rights Act 1998 and the various devolution statutes applying to the devolved arrangements in Scotland, Wales and Northern Ireland. These arrangements could suggest a model of core UK rights augmented by and different from rights which would only apply in Scotland, Wales and Northern Ireland.
>
> Another model would be to have one UK application from which derogations by the devolved jurisdictions would be possible."[14]

Thus theoretical options can begin to be identified. The following list is not necessarily exhaustive, nor does the inclusion of an option in the list mean that it is considered a desirable option:

A. An inter-governmental conference, held in or after 2015, to discuss a new UK Bill of Rights, potentially containing additional rights and modified mechanisms, to have application in all parts of the UK and in respect of both Westminster and devolved matters in Scotland and Wales. In addition to the UK Government, such a conference would involve the Welsh Government, the Northern Ireland Executive, the Scottish Government (if the result of the referendum is a majority for Scotland remaining in the UK). There would be no change to the status quo other than as an agreed outcome of the conference, and no change affecting Northern Ireland in the absence of a successful conclusion to its process for a Northern Ireland Bill of Rights.

B. An inter-governmental conference, held in or after 2015, to discuss a new Bill of Rights, to have application in Great Britain, but not, at any rate in the first instance, in Northern Ireland, in respect of both Westminster and devolved matters. Such a conference would involve the UK Government, the Welsh Government and the Scottish Government (if the result of the referendum is a majority for Scotland remaining in the UK). In other respects this option would be the same as A. There would be no change to the status quo other than as an agreed outcome of the conference.

[14]Law Society of Scotland, Discussion Paper Response, p. 5.

C. The enactment by the Westminster Parliament of a UK Bill of Rights, potentially containing additional rights and modified mechanisms, but with a suspensory provision so that it did not come into effect in relation to devolved functions unless and until the relevant devolved institutions agreed. Pending such agreement the Human Rights Act and the "Convention rights" fetter would remain in force in respect of devolved functions in Northern Ireland, Scotland and Wales. Until such time the new Bill of Rights would, broadly speaking, apply to UK-wide functions only, such as immigration and the armed forces, and to the discharge in England of all government functions. This arrangement would leave it open to the Scottish and Welsh legislatures further to develop their own rights agendas by the enactment of additional rights in respect of devolved matters if they chose.

D. The enactment by the Westminster Parliament of a Bill of Rights similarly to C above, save that it would state that it applied to non-devolved functions only (rather than purporting to apply to all governmental functions with a suspensory effect pending agreement of devolved institutions). Of course, the Westminster Parliament could subsequently introduce legislation extending its effect to devolved functions, if and when discussions with devolved institutions made that appropriate.

E. The enactment by the Westminster Parliament of a Bill of Rights in two separate chapters, one governing UK-wide non-devolved functions, the other in respect of functions which are devolved in some or all the other parts of the Kingdom. This latter chapter would create for England the same opportunity, which all the options allow for Scotland, Wales and Northern Ireland, of the making of a selection of rights representing its own preferences or reflecting its own rights heritage.

F. The enactment by the Westminster Parliament of two separate Bills, one a UK Bill of Rights, the other an English Bill of Rights. If the work of the McKay Commission leads to an arrangement under which only MPs for English constituencies vote for laws affecting England alone, the composition of the parliamentarians involved in the enactment of the English Bill would be reduced from that of the full House of Commons.

It is repeated that the inclusion of an option above in no way connotes that it is considered suitable or desirable.

Conclusion

The possibility of a new Bill of Rights should be discussed in or after 2015 with the devolved institutions at an intergovernmental conference or some form of constitutional convention. Such a new Bill ought not to be enacted so as to apply to devolved functions without the consent of the devolved institutions in question. But the project for a new Bill of Rights would not be stalled in the absence of agreement from devolved institutions. There are a number of options, consistent with the Sewel Convention, by which the project could be pursued in respect of UK-wide and other non-devolved functions. There is nothing inherently undesirable about the asymmetry of rights which would thereby arise. It is common in other parts of the world to find asymmetrical rights in countries with multi-level government. Moreover, such a development is already under way in the UK with the devolved institutions in Scotland and Wales already implementing their own rights policies, and with a distinct Northern Ireland Bill of Rights a feature of the Belfast/Good Friday Agreement.

Mechanisms of a UK Bill of Rights

by Anthony Speaight QC

This paper is concerned with the levers of enforcement by which the constitutional principles in a UK Bill of Rights might be given effect. There are four principal levers in the Human Rights Act:

a. The enhanced interpretative provision in section 3.

b. The declaration of incompatibility in section 4.

c. The duty on public authorities and remedies for breach in sections 6 to 8.

d. Ministerial statements of compatibility in section 19.

The position of the majority of the Commission, as expressed in the Overview, is that, while we believe that there may be scope for some specific changes to the Human Rights Act position in respect of these mechanisms, for the most the mechanisms in any UK Bill of Rights should be broadly similar to those in the Human Rights Act. This paper explores what those specific changes might be, and which levers should be retained wholly unaltered. The views here expressed are purely personal. My thinking has been significantly influenced by many discussions with fellow members of the Commission; however, some of them strongly disagree with aspects of my ideas.

The interpretative role

The Human Rights Act in section 3(1) provides:

> "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

The apparently simple words of section 3 have generated controversy in some quarters. In introducing the Human Rights Bill the Home Secretary explained the Government's intentions in this exchange with the present Attorney General:

> "'…for the avoidance of doubt, I will say that it is not our intention that the courts, in applying what is now clause 3, should contort the meaning of words to produce implausible or incredible meanings. I am talking about plain words in what is actually a clear Bill with plain language – with the intention of Parliament set out in Hansard, should the courts wish to refer to it.'

> Mr. Grieve: 'Perhaps the clause should say "possible and reasonable", but the Rt Hon gentleman might then say that the courts are always supposed to be reasonable, so it is not necessary to include that word.'
>
> Mr. Straw: 'Ever since the Wednesbury decision, the courts have chided others for being unreasonable, so it is difficult to imagine them not being reasonable. If we had used just the word "reasonable", we would have created a subjective test. "Possible" is different. It means, "What is the possible interpretation? Let us look at this set of words and the possible interpretations." My bet is – without putting this in the Bill – ... that the courts will say that they will adopt a reasonable approach.'"[1]

However, implausible and unreasonable interpretations are exactly what some critics believe to have occurred. By way of example, Charles Elphicke MP said in his response to us:

> "... the Human Rights Act exacerbates the problem of judicial interpretations of human rights subverting the expressed will of Parliament. Section 3 of the Human Rights Act requires UK courts to adopt a very different approach to 'interpretation' of legislation, which has led to the abandonment of the ordinary meaning of legislation in many cases, so as to mould the law into compliance with judges' constructions of human rights. Parliament's clear will when enacting the relevant legislation can, and has, been set aside."[2]

Others are not troubled by the approach which has been adopted by the courts. In fact, many observers do not believe that the courts have in practice abandoned the ordinary meaning of legislation. But one can understand how these fears have arisen. In striking and surprising contrast to the assumption of Mr Straw and Mr Grieve that the courts would adopt only interpretations which were reasonable, Lord Steyn said in *Ghaidan v. Godin-Mendoza*:[3]

> "Parliament specifically rejected the legislative model of requiring a reasonable interpretation."

In the same case Lord Nicholls said:

> "Unfortunately, in making this provision for the interpretation of legislation, section 3 itself is not free from ambiguity. The difficulty lies in the word 'possible'....What is not clear is the test to be applied in separating the sheep from the goats. What is the standard, or the

[1] HC Deb, 03 June 1998, vol. 313, cols. 422-3.
[2] Consultation Paper Response, pp. 1-2.
[3] [2004] AC 557, at para. 44.

> criterion, by which 'possibility' is to be judged? A comprehensive answer to this question is proving elusive."[4]

The standard textbook, *Bennion on Statutory Interpretation*,[5] comments on Lord Nicholls' remarks:

> "This criticism is expressed with the understatement to be expected of their Lordships House. Reading between the lines one senses a fine lawyer's outrage that so vital a provision should be expressed in so clumsy a way. In fact the fault lies not in the drafting but the conception. The political desire was to distort the true meaning of legislative language so as to facilitate the fuller application of the Convention."

Whether that stricture is justified or not, the very fact that such passages have been written reflects some support for considering an alternative approach. It is not a happy situation that a crucial provision in a constitutional statute should be found ambiguous; and it is not conducive to broad acceptance of the law for it to appear that some judges consider that they have been encouraged to make interpretations which are unreasonable. In *The Rule of Law*[6] Tom Bingham identifies eight characteristics or principles of the rule of law. The first is:

> "The law must be accessible, and so far as possible intelligible, clear and predictable."

Therefore, alternative language might set out an approach to the interpretative role which could command broad acceptance and put to rest any fears that judges might be engaged in law-making.

Such an approach could involve two principles, which can be readily understood. On the one hand, if the meaning of legislation is clear, then the role of the court is to state and apply that meaning. On the other hand, if the meaning is less than clear, or if more than one meaning is possible, then the primary tool to be applied in determining the meaning should be by reference to the constitutional rights.

The policy suggested in the preceding paragraph would fit well with the orthodox principles of domestic law. The principle that a plain meaning should be accepted is well established. Lord Reid expressed it thus:

> "In determining the meaning of any word or phrase in a statute the first question to ask always is: what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been

[4] Ibid., at para. 27.
[5] 5th ed. (London: LexisNexis, 2005).
[6] (London: Allen Lane, 2010).

> the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase."[7]

However, there may be many circumstances in which either the natural meaning is unclear, or in which there are grounds for doubt about whether it should be taken as intended. Bennion begins with this summary of principles:

> "Section 2. Interpreter's duty to arrive at legal meaning
>
> The interpreter's duty is to arrive at the legal meaning of the enactment, which is not necessarily the same as the grammatical meaning. This must be done in accordance with the rules, principles, presumptions and canons which govern statutory interpretation (in this Code referred to as the interpretative criteria...).
>
> Section 3. Real doubt as to legal meaning
>
> If, on an informed interpretation, there is no real doubt that a particular meaning of an enactment is to be applied, that is to be taken as its legal meaning. If there is a real doubt, it is to be resolved by applying the interpretative criteria...."

The possible interpretative criteria are very numerous. They range from the principle that law should not operate retrospectively to the principle against doubtful penalisation (i.e. that criminal provisions must be interpreted strictly). Depending on quite how they are classified, there are dozens of established interpretative criteria. Therefore, there is considerable scope for more than one such criterion to apply in a given situation and where this happens, they may point in different directions. In consequence, doubts as to meaning frequently arise:

> "Section 150. Nature of legal meaning.
>
> As stated in Code s. 2, the interpreter is required to determine and apply the legal meaning of the enactment, that is the meaning that correctly conveys the legislative intention. This usually corresponds to the grammatical meaning of the verbal formula that constitutes the enactment. If however the verbal formula, in its application to the facts of the instant case, is ambiguous the legal meaning will be in doubt. Even where the verbal formula is not ambiguous, there may be real doubt as to the legal meaning because the relevant factors drawn from the criteria laid down as guides to the legislative intention tend in different directions."[8]

[7] *Pinner v Everett* [1969] 1 WLR 1266 at p. 1273.
[8] Bennion, *Bennion on Statutory Interpretation* 5th ed. (London: LexisNexis, 2005), p. 441.

Where one factor points one way, and another in a different direction, the task of a court is to weigh and balance them. In this exercise it may be that one will be of a higher level of importance than another. H.L.A. Hart has written in *The Concept of Law*:

> "There is no reason why a legal system should not recognise that a valid rule determines a result in cases to which it is applicable, except where another rule, determined to be more important, is also applicable to the same case."[9]

Thus it would fit well with orthodox principles of interpretation for there not only to be a principle that Parliament is presumed to have legislated compatibly with the constitutional rights, but also that this principle should have priority over other interpretative criteria. Such a position would eliminate the uncertainties created by the 'so far as it is possible to do so' formula. It should also lay to rest the fear that judges are being encouraged either to cease to decide reasonably, or to adopt strained interpretations.

Therefore, a satisfactory interpretative rule in a UK Bill of Rights might be expressed thus:

> "(1) Nothing in this section detracts from the principle that, unless there is something to modify, alter or qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning.[10]
>
> (2) Unless the contrary intention appears, any enactment is presumed to have a meaning compatible with the constitutional rights.
>
> (3) The principle expressed in the preceding sub-section shall be the primary interpretative criterion."

The relationship to the Strasbourg Court, other courts outside the UK and international obligations

The Human Rights Act in section 2(1) provides:

> "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any
>
> (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
>
> ...whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen."

[9](Oxford University Press, Clarendon Law Series, 1994), p. 262.
[10]This formula of words is that in which the plain meaning rule is stated in *Halsbury's Laws of England: Statutes* 44(1) (Reissue) (Butterworths, 1995), para. 1487.

There is no absolute need for there to be any equivalent provision at all in a UK Bill of Rights concerning the regard to be paid to the Strasbourg Court. In a UK Bill the rights would be domestic constitutional rights, which may in some cases be related to international obligations, rather than Convention rights as such.

Nonetheless there is good reason why a UK Bill should contain express provision referring to the European Court of Human Rights. Firstly, if there is no allusion at all to the Strasbourg Court, it might be read as a message that the Convention itself is to be cut completely out of the picture: that is not the outcome which I intend.

Secondly, I see considerable value in the judicial dialogue between the senior UK courts and the Strasbourg Court, and am keen that this should continue. Since it is a given to the scheme we are considering that the UK will continue to adhere to the Convention, the UK will continue to be under a treaty obligation to accept the final judgments of the Strasbourg Court. Even if the UK were to withdraw from the Convention, decisions of the Strasbourg Court would continue to have an impact in the UK via the influence which it may be expected to exert over decisions of the Court of Justice of the European Union on the EU Charter of Fundamental Rights. There has today developed a relationship of dialogue in which one can see weight being accorded by the Strasbourg Court to decisions of our domestic courts on the meaning and application of Convention articles. In this way, the Human Rights Act has had the positive effect of allowing our judges to interpret and apply the Convention, and this has in turn caused the Strasbourg Court to have regard to judgments of our courts. It is desirable that this dialogue should continue, not least since it allows our courts to have greater influence internationally.

A good example is afforded by recent cases on the whether a criminal trial is rendered unfair by the reading of a statement on an important aspect from a witness who, by reason of death or fear, is not available to be cross-examined in court. In January 2009 a chamber decision of the Strasbourg Court in *Al-Khawaja and Tahery v. UK*[11] held that this practice amounted to a violation of Article 6. Six months later the same issue came before the Supreme Court, which unanimously considered that the practice in the cases before it was fair and Article 6 compliant.[12] The opinion of Lord Phillips and annexes prepared by Lords Judge and Mance set out detailed reasons for considering the Strasbourg Court chamber decision to be mistaken. The *Al-Khawaja* case then proceeded to the Grand Chamber, which in December 2011 accepted the reasoning of the Supreme Court and reversed the chamber decision. This case illustrates how serious and well-argued criticism from a senior UK court can contribute constructively to the quality of Strasbourg Court jurisprudence. Many people would wish to see such occurrences continue to happen.

[11] Applications 26766/05 and 22228/06 [2011] ECHR 2127.
[12] *R v. Horncastle* [2009] UKSC 14.

It follows that if there were to be a UK Bill of Rights I would wish to encourage domestic courts to take into account and address Strasbourg Court judgments, whilst continuing to be free to express disagreement where they consider the circumstances require it.

It might be argued that the best way to achieve this would be by maintaining, *mutatis mutandis*, the "must take into account" formula of section 2 of the Human Rights Act. But a sound reason for not doing so is to be found in recent pronouncements from some of the strongest supporters of the 1998 Act.

Foremost amongst these contributions is a lecture delivered by Lord Irvine of Lairg in December 2011.[13] Lord Irvine argued that courts from the Supreme Court and House of Lords downwards had proceeded:

> "…on the false premise that they are bound (or as good as bound) to follow any clear decision of the ECHR which is relevant to a case before them."

He drew attention to the fact that "take into account" is not the same as 'follow', 'give effect to' or 'be bound by.' He traced the genesis of this wrong approach to *R (Alconbury) v. Secretary of State for the Environment*[14] in which Lord Steyn had suggested that in the absence of some special circumstances the domestic court should follow "any clear and consistent jurisprudence of the Strasbourg Court": this, Lord Irvine complained, was simply a policy for the perpetuation of error, since if a proposition was wrong its repetition could not make it right.

Lord Irvine cited the House of Lords decision in *AF v. Secretary of State for the Home Department*[15] as the starkest example of the wrong approach. This was the case in which Lord Rodger of Earlsferry famously said:

> "Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentoratum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed."

The *AF* case was concerned with control orders made in respect of terrorist suspects, where crucial evidence had been seen by a Special Advocate but neither its content nor gist was communicated to the individual. The Strasbourg Grand Chamber had recently held the arrangement infringed the Convention. Lord Hoffmann said he considered Strasbourg's decision wrong but that the House of Lords "had no choice but to submit." Lord Irvine described as of "foundational importance" the point that "it would strike at the very heart of the integrity of our courts" if a statute "obliged them to declare our law to be something which

[13]Lecture delivered to the Bingham Centre for the Rule of Law under the title "A British Interpretation of Convention Rights" on 14 December 2011, accessible at http://www.ucl.ac.uk/laws/judicial-institute/docs/Lord_Irvine_Convention_Rights_dec_2012.pdf.
[14][2003] 2 AC 295.
[15][2009] 3 WLR 74.

they regard as fundamentally unsound in principle... simply because of the latest decision of the Strasbourg Court."

Lord Irvine did not confine his criticism to occasions when a domestic court was led by deference to the Strasbourg Court to find an infringement where otherwise it would not have seen one. He was equally scathing of reluctance to find an infringement solely because the Strasbourg Court had not yet considered the matter.[16] He condemned the so-called "mirror principle" of "no more and no less"[17] as contrary to the Human Rights Act.

A similar viewpoint, albeit in gentler language, was expressed a few weeks later the same time by Lord Kerr of Tonagmore.[18] In a lecture he argued:

> "By providing the charter of rights in a domestic dispensation, Parliament conferred on the courts a source for those rights that is distinct from the Convention and, on that account, when occasion demands it, distinct from the Convention's court's perception of the content of the rights."

He ended by expressing the hope that Lord Rodger's dictum could be rewritten as "Strasbourg has spoken; now it is our time to speak."

The contrary approach was expounded by Lord Hope in *Ambrose v. Harris (Procurator Fiscal)*:[19]

> "Parliament never intended to give the courts of this country the power to give a more generous scope to those rights than that which was to be found in the jurisprudence of the Strasbourg Court. To do so would have the effect of changing them from Convention rights, based on a treaty obligation, into free-standing rights of the court's own creation."

Thus what divides the two schools of thought is a difference of perception as to whether or not Parliament intended the Human Rights Act to be a domestic charter of rights. Since a UK Bill of Rights would *ex hypothesi* be a domestic charter of rights, it seems natural that our courts should be free – and, even, in the interests of judicial dialogue encouraged – to determine rights differently from the Strasbourg Court. That consideration points towards making a change from the formula in section 2 of the Human Rights Act which has, correctly or incorrectly, led many judges to the deference of the mirror principle.

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[16] An example is *Ambrose v. Harris (Procurator Fiscal)*, [2011] 1 WLR 2435, where Lord Hope said that it was not for the court to expand the scope of the Convention rights further than the Strasbourg Court.

[17] The original formulation by Lord Bingham in *R (Ullah) v. Special Adjudicator* [2004] 2 AC 323 was "no more but certainly no less". In *R (Al-Skeini) v. Secretary of State for Defence*, [2008] 1 AC 153 Lord Brown re-worked it as "no less, but certainly no more".

[18] "UK Supreme Court: the modest underworker of Strasbourg?", Clifford Chance Lecture, held at Canary Wharf, 25th January 2012.

[19] [2011] 1 WLR 2435.

Other factors also point in that direction. If there were to be a UK Bill of Rights, part of its purpose would be to allow the addition of rights which are not fully reflected in, or wholly absent from, the Convention: the interpretation of such rights clearly should not be cramped by wholesale deference to the Strasbourg jurisprudence.

Another part of the purpose would be to link modern rights jurisprudence to our domestic heritage of rights in such cases as *Somersett's case*,[20] which was Lord Mansfield's famous decision on slavery. One of the regrets held by some about the recent prominence of the Human Rights Act is that it has led to our own heritage being forgotten. The Scottish judge, Lord Reed, now in the UK Supreme Court, recently deplored the citation of Strasbourg cases when there was domestic case-law to similar effect:

> "The protection of human rights in our law did not begin in 1998 with the Human Rights Act; nor did it begin in 1950 with the Convention. The rights which the UK undertook to protect, when it ratified the Convention, have been protected in this country for centuries by the common law and by statute."[21]

English jurists have made a similar point. In her Atkin Lecture in 2011 Dinah Rose QC said:

> "… there can be no doubt that the common law has for generations recognised and protected a category of fundamental human rights, which are treated as having a special constitutional status, and which will prevail unless they are overridden by clear and specific statutory language, demonstrating a recognition by Parliament of the implications of its actions."[22]

In his response to our consultation Stanley Brodie QC argues that by 1765,

> "… there existed at common law *absolute* rights for the protection of individuals. They can in modern terms be summarised as follows:
>
> (i) The right to life, i.e. security of the person;
>
> (ii) The right to liberty and not to be unlawfully detained (*habeas corpus);*
>
> (iii) The right to own private property and have it protected;
>
> (iv) The right to free speech;
>
> (v) The right and liberty to practice one's religion (stemming from the rights to life and liberty);

[20] In 1772, ruling that the man who brought a slave to England had no right to detain him after he had sought to escape.

[21] See the lecture by Lord Reed delivered in March 2011 at a joint event of the Scottish Public Law Group and the Faculty of Advocates, entitled "The Interrelationship of Strasbourg and UK Human Rights Law – A Perspective from the Scottish Courts", available in an article with the same title, (2011) EHRLR 5 pp. 505-512.

[22] Dinah Rose QC Atkin Memorial Lecture 2011, "Beef and Liberty: Fundamental Rights and the Common Law."

(vi) The right of access to justice and to a fair trial which includes equality before the law."

Therefore, domestic authority should be the first port of call in interpreting the constitutional rights in a UK Bill of Rights. The Strasbourg Court's decisions should be persuasive authority, not binding authority.

That leaves the questions of the role of the jurisprudence of other courts outside the UK, and what, if anything, should be said about it.

One category of such jurisprudence is that of courts in other common law jurisdictions. At the level of our highest courts the case-law of other common law jurisdictions is regularly cited in judgments. By way of example, in *R v. Horncastle*, the UK Supreme Court's opinions contained discussion of decisions in Canada, Australia, New Zealand and the US Supreme Court. The Supreme Courts of India and South Africa are amongst other courts whose decisions are often regularly discussed in judgments in this country. But the existence of this cross-fertilisation of judicial thinking across the common law world has been somewhat obscured by the emphasis given to Strasbourg decisions since the enactment of the Human Rights Act. Both by reason of the high quality of the judgments to be found in other common law jurisdictions and their level of understanding of our legal traditions, there should be encouragement of reference to reported decisions of courts elsewhere in the common law world. There is also a national interest in promoting greater awareness of the reality of the international judicial comity of the common law world, in which our country has such a leading position.

There are also occasions when decisions of various international courts are of relevance to decisions on the recognition and implementation of rights, even if they are not binding as such: attention to such decisions, where relevant, is another natural course for a court in our tradition.

The European Court of Justice stands in a category all of its own. It now has the role of interpreting and applying the EU Charter of Fundamental Rights: contrary to some beliefs, the UK is not immune from the impact of the Charter on the interpretation of European Union law. It would be in the UK's national interest to foster a relationship of judicial dialogue with the European Court of Justice.

The discussion in the preceding paragraphs is concerned with the extent to which case law from outside the UK on similarly phrased rights may be persuasive authority on the interpretation of rights in UK domestic law. This, however, does not exhaust the relevance of the Convention, since it is a given for the recommendation of the Commission's majority that the UK will remain subject to a treaty obligation to secure its rights. That obligation will continue to exist irrespective of the interpretation which may be placed on home-grown rights. Some people fear that the existence of domestic rights may wholly distract attention from the UK's obligations. I believe this fear to be unfounded since a presumption of

conformity with international law and obligations is already a principle of our domestic law. This presumption is not confined to the European Convention on Human Rights; by way of example, it has been held to extend to the Convention on the Status of Refugees.[23] A recurrent theme in the Commission's thinking has been the assuaging of fears, and this is another area where that can be done.

Therefore, if there were to be a UK Bill of Rights, a satisfactory provision as to the relationship with the Strasbourg Court, other courts outside the UK and international obligations might be as follows:

> "(1) The primary source of case law for the interpretation and application of the constitutional rights shall be domestic case law.
>
> (2) A court or tribunal which is concerned with the interpretation and application of the constitutional rights may, in so far as it considers it relevant, take into account as persuasive authority decisions on provisions in treaties affecting the United Kingdom of,
>
> (a) the European Court of Human Rights;
>
> (b) the European Court of Justice;
>
> (c) other international courts;
>
> but in each such case shall be at liberty to express disagreement with the decisions of such courts.
>
> (3) A court or tribunal which is concerned with the interpretation and application of the constitutional rights may, in so far as it considers it relevant, take into account as persuasive authority decisions on rights expressed in the same or similar terms of courts elsewhere in the common law world.
>
> (4) Unless the contrary intention appears, any enactment is presumed to have a meaning in conformity with international obligations of the United Kingdom."

Declarations of incompatibility

Section 4 of the Human Rights Act begins:

> "(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."

[23] *Saad & Others v. Secretary of State for the Home Department* [2001] EWCA Civ 2008.

The Commission has received virtually no criticism of this feature of the 1998 Act. There have been 19 declarations of incompatibility since the Human Rights Act came into force.[24] In most cases Parliament has chosen to remove the incompatibility by primary legislation.[25] There seems no reason why a UK Bill of Rights, if enacted, should do other than reproduce the above wording in relation to primary legislation, with the simple substitution of "constitutional rights" for "Convention rights."

Issues which require discussion are the mechanisms which can follow a declaration of incompatibility, and the possible extension of the availability of such declarations. Another issue which arises is the application of declarations of incompatibility to delegated legislation. This is connected to the question of whether it should be a breach of a minister's duty to make a statutory instrument which contravenes constitutional rights, and is discussed in the next section. However, in our view, a declaration of incompatibility should always be available in respect of delegated legislation.

Remedial orders

The guiding principle should be that the primary role in resolving questions which are often political in nature, should lie with Parliament.

The Human Rights Act contains provisions in section 10 for what are called 'remedial orders.' This procedure empowers a minister to make an order which is to have the effect of amending primary or secondary legislation. An affirmative resolution of both Houses is required, but such resolutions are routinely passed without any debate and with minimal awareness of what is happening. It is believed to be 43 years since an affirmative resolution was last defeated.[26] This power becomes available to a minister if a court has made a declaration of incompatibility or if the Strasbourg Court has made a finding that a provision in legislation is incompatible with the Convention.

Remedial orders have been made on just five occasions since the Human Rights Act came into force. In the great majority of instances, findings of incompatibility by either a domestic court or the Strasbourg Court have been dealt with by primary legislation. So the remedial order is a mechanism which has assisted on very few occasions.

The remedial order's existence, however, is considered by some people to be problematic. Provisions which enable a minister by order to amend primary legislation are known are known as 'Henry VIII clauses'. There is a widely held view that, whilst their use can sometimes be justified in modern conditions in order to avoid unduly lengthy primary

[24]See *Responding to Human Rights Judgments*, Ministry of Justice report September 2012, available at http://www.justice.gov.uk/downloads/publications/policy/moj/responding-human-rights-judgments.pdf. There have in total been 27 declarations of incompatibility, but eight were overturned on appeal.
[25]This has occurred in 15 of the 19 cases; 11 by subsequent primary legislation; in four cases the offending provision had already been remedied by primary legislation by the time of the declaration. Source: Ibid.
[26]On 12th November 1969, resolutions relating to boundary changes were defeated with the encouragement of the Minister presenting them.

legislation for the purpose of making innocuous revisions, it is undesirable that Henry VIII clauses be used in any controversial matter.[27] They erode democratic control, and magnify the power of the executive. Since the thrust of human rights protection tends to be to subject the executive and the organs of the state to proper control, there is a feeling in some quarters that this is one of the least suitable situations for the employment of Henry VIII clauses. Even some strong supporters of the Human Rights Act would be happy to see the back of remedial orders.

In striking the balance between the very small practical value of remedial orders and the strong objections in principle in some quarters, I consider that the most satisfactory UK Bill of Rights, if one were to be enacted, would not contain any equivalent of remedial orders. However, it should not become easy to ignore such declarations: to avoid that, there could be a statutory obligation for a suitable prescribed number of parliamentary hours to be provided for business on the floor of both Houses in respect of any declaration of incompatibility made by a court.

A formal role for a Joint Parliamentary Committee on Constitutional Rights

Over the last decade, the Joint Parliamentary Committee on Human Rights has established a considerable reputation, both at home and abroad. It scrutinises government bills and identifies those with potential human rights implications for more detailed study. It also monitors government action when declarations of incompatibility have been made. A report from the Council of Europe Parliamentary Assembly[28] lavished particular praise on this Committee's work as a leading example of good practice. Because this influential Committee is a parliamentary organ, rather than a quasi-governmental body, any role for it satisfies the policy that difficult human rights issues should be a matter primarily for Parliament.

At present, this Committee has no statutory foundation. It would be deeply unfortunate if the Committee were ever to be allowed to slide into desuetude. Therefore, an appealing feature of a UK Bill of Rights could be a provision providing a statutory foundation for such a Committee. Although it would be regarded as contrary to normal practice for a statute to require the existence of a parliamentary committee, an exception might be considered justified in this case. In order to emphasise that its work should focus on giving teeth to the rights provisions in the UK Bill of Rights, it would be appropriate for it to be called in future the Joint Parliamentary Committee on Constitutional Rights.

There seems much to be said for allowing a Joint Parliamentary Committee on Constitutional Rights to make proposals for remedying incompatibilities without the need for a prior judicial declaration. It is not always appreciated that no litigant can bring proceedings before a court

[27] See, for example, the third report of the House of Lords Select Committee on Delegated Powers and Regulatory Reform (2002), available at http://www.publications.parliament.uk/pa/ld200203/ldselect/lddelreg/21/2101.htm.

[28] *National Parliaments: Guarantors of Human Rights in Europe*, Committee on Legal Affairs and Human Rights, Doc. 12636**,** June 2011, available at http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc11/EDOC12636.htm.

solely for a declaration of incompatibility under section 4 of the Human Rights Act. Such declarations are available only when proceedings are before a court on some more substantive basis. That is almost always in proceedings for judicial review, or in a statutory appeal in which a litigant is presenting a rights-based argument to seek a substantive remedy, such as a quashing order. Typically, the declaration of incompatibility, which brings no direct benefit to the applicant, will be made if the applicant fails in his principal argument. The applicant will normally have reached the stage of such a hearing only if he has previously shown reasonable prospects of success in his primary argument, which may well be that on reading down a legislative provision in the light of Convention rights, it has a meaning favourable to him. An applicant requires the Court's permission to proceed to a substantive hearing in judicial review. Such permission is normally granted only if there are reasonable prospects. If it is clear that a provision in a statute is incompatible with a Convention right, it is likely to be obvious that an argument based on reading down under section 3 of the Human Rights Act will fail. In such circumstances, permission for judicial review is likely to be refused. On the other hand, if the situation is more marginal, permission is likely to be granted, creating the opportunity for a declaration of incompatibility if the principal case fails.

Accordingly, and perversely, the more glaring the incompatibility between a legislative provision and a Convention right, the harder it is to obtain a hearing at which a declaration of incompatibility might be made. This shortcoming in the Human Rights Act could be rectified under a UK Bill of Rights if the Joint Parliamentary Committee on Constitutional Rights itself were to be empowered to make declarations of incompatibility. This could, at the Committee's discretion, be done either of its own motion, or after consideration of a case presented to it by a member of the public. In principle, such a declaration by the Committee should also trigger an obligation for Parliament to allow time in both Houses to consider it. For practical reasons, there could be a ceiling of the maximum number of hours of parliamentary time in each session of Parliament available for the Committee to bring such business.

Proposals

Therefore, if there were to be a UK Bill of Rights, a satisfactory provision in respect of the matters discussed above could be as follows:

> "(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary or secondary legislation is compatible with a constitutional right.
>
> (2) If the court is satisfied that the provision is incompatible with a constitutional right, it may make a declaration of that incompatibility.
>
> (3) If a court makes a declaration under subsection (2), then the Leader of the House of Commons and the Leader of the House of Lords shall each propose in their respective Houses an allocation of

parliamentary time to consider business in respect of such declaration.

(4) There shall be a Joint Committee of both Houses of Parliament entitled the Joint Parliamentary Committee on Constitutional Rights.

(5) The Joint Parliamentary Committee on Constitutional Rights shall be empowered,

(a) to monitor declarations made by a court under subsection (2); and

(b) itself to make declarations that a provision of primary or secondary legislation is incompatible with a constitutional right.

(6) If the Joint Parliamentary Committee on Constitutional Rights makes a declaration under subsection (5)(b), then the Leader of the House of Commons and the Leader of the House of Lords shall each propose in their respective Houses an allocation of parliamentary time to consider business in respect of such declaration. However, there shall be no such obligation if a House has fixed a maximum allocation of parliamentary time in a session for such business, and such allocation has already been exhausted."

Liability of public authorities

Section 6(1) of the Human Rights Act states:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

Sections 7 and 8 of the 1998 Act provide for various remedies, including damages. Section 8 provides in part:

"(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."

A further consequence of the section 6 liability, albeit one which does not appear very clearly from the face of the Act, is that delegated legislation, which is incompatible with Convention rights is liable to be declared *ultra vires* and quashed.

The exposure of public authorities to damages for Convention non-compliance has attracted criticism. The Society of Conservative Lawyers said in its consultation response to us:

> "the Strasbourg Court's decisions have led to the fashioning of a number of new types of claim previously unknown to the common law. These typically involve claims for compensation against the state not for its own wrongdoing, but for failings on the part of its employees to act with sufficient skill and care to prevent or protect them from the wrongdoing of others. Thus new causes of action have been created against the police for failing to prevent crime (*Osman v. UK, Rantsev v. Cyprus)* and against social services for failing to remove children from their parents (*Z v. UK)*. Whilst there are arguments for and against the imposition of a tort liability for operational negligence on public authorities in such areas, we do not believe that they belong in a discourse concerning fundamental human rights. Indeed, we consider that the fact that the HRA can be used as a "tort statute" has played a significant part in the creation of the Act's poor image. For example, a rash of compensation claims and awards for prisoners who did not receive heroin substitutes timeously has not improved the public perception of human rights. We would propose that the new Bill of Rights should not give rise to private law causes of action for damages for its breach, but should be concerned with pre-empting apprehended infringements of human rights, bringing existing infringements to an end, or vindicating infringements of those rights in the recent past by appropriate declaratory relief."[29]

On the other hand, the section 6 duty and the liability to damages has many strong supporters. Disability organisations such as Action on Hearing Loss and the Disability Charities Consortium considered it vital to retain these features in the interests of promoting decent standards in the provision of caring services. Amnesty International UK considers this provision a particularly important part of the Human Rights Act. The Prison Reform Trust singles out the section 6 duty as providing an important framework for holding public bodies to account when things go wrong.

[29]Discussion Paper Response, p. 4.

Monetary compensation

It is of interest to investigate whether there are routes to damages for breach of other bills of rights elsewhere in the common law world.[30] In the United States, a federal statute was enacted in 1871 stating that any person who "under color" of a legal right subjects another "within the jurisdiction to the deprivation of any rights, privileges or immunities secured by the Constitution" shall be liable for redress.[31] This statute was originally enacted in response to the strength in some states of the Ku Klux Klan, so as to enable individuals to bring claims in against state governments for failure to enforce constitutional guarantees. In more recent years, it has become one of the most widely litigated federal provisions. By the first ten amendments to the US Constitution, there are many rights including free speech, due process, freedom from search and seizure and so forth. The 1871 statute thus provides a route by which redress may be sought for a wide variety of rights. A Supreme Court decision in 1961, *Monroe v. Pape*[32] held that the scope of the Statute extended to any actions by state officials, whether authorised or not. In 1971, the US Supreme Court held that there is also a common law cause of action for breach of constitutional rights.[33] Damages are available for breaches but are not granted automatically.

In New Zealand, a Bill of Rights was enacted in 1990. It is similar to the Human Rights Act in the sense that it is not entrenched. Its most obvious lever is an interpretative provision, stating that a meaning compatible with the rights is to be preferred to one which is not. It says nothing about a liability on a public authority to pay damages, nor any other remedy. However, in 1994, the New Zealand Court of Appeal held that the Bill of Rights Act implied that there should be a monetary remedy for breach of the guaranteed rights:[34] otherwise, the Court said, the rights could be allowed to become empty words. In that and other cases, the New Zealand courts have held that monetary compensation is discretionary. Indeed, in 2003, a court stated that a monetary remedy "must be seen as only available in exceptional circumstances."[35]

In India, the constitution was created by a Constituent Assembly in 1949. Article 32 provided that the Supreme Court should have power to issue writs, including certiorari, mandamus, prohibition and habeas corpus. There is no express mention of a right to monetary redress. But in 1983, the Supreme Court acceded to a request to award damages under Article 32 in the case of a man who, following an acquittal, was kept in custody, quite unlawfully, for a further 14 years.[36] It seems to have been accepted that the individual would have had a right to damages in a civil action for the equivalent of the tort of false imprisonment; so the award

[30] I am indebted to Lisa Tortell for the assistance which I have derived from her book *Monetary Remedies for Breach of Human Rights: a Comparative Study* (Oxford: Hart Publishing, 2006).
[31] Civil Action for Deprivation of Rights, 42 USC s.1983.
[32] 365 US 167, 81 S Ct 473 (1961).
[33] *Bivens v. Six Unknown Named agents of Federal Bureau of Narcotics* 403 US 388, 91 S Ct 1999 (1971).
[34] *Simpson v. Attorney-General (Baigent's case),* [1994] 3 NZLR 667.
[35] *Brown v. Attorney-General*, [2003] 3 NZLR 335, 349.
[36] *Rudul Sah v. State of Bihar* AIR 1983 SC 1086.

under Article 32 was a device for procedural efficiency. It is reported that there is a power to award damages under the Canadian Charter of Rights and Freedoms Act 1992 and the South African Constitution Act 1996, but that in both countries that has had no more than a modest impact.[37]

This survey of the common law world suggests that there is a considerable impetus towards the availability of monetary compensation for breaches of rights, but some caution as to how widely the right should be exercised. In particular, the tendency seems to be to regard the making of a monetary order as discretionary. That approach would correspond to the practice of the Strasbourg Court, where orders for financial "just satisfaction" are available under Article 41 of the Convention, but far from routine.

On balance, therefore, my inclination is that a UK Bill of Rights, if adopted, should contain a jurisdiction in a court to award damages, but this course should be discretionary. Such a discretionary element would conform to the position under section 8(3) of the Human Rights Act. The leading case under the Human Rights Act on how the courts will exercise the power to award damages is *Anufrijeva v. Southwark LBC* [38]: there, the Court of Appeal emphasised the discretionary nature of damages under section 8.

A scheme for the existence of discretionary damages under a UK Bill of Rights provides an opportunity to address one of the issues which has caused some concern. That is how to bring the concept of responsibilities into the Bill without making the very existence of rights contingent on the observance of responsibilities. As explained in the main report, the majority of the Commission recommend a Bill of Rights containing a jurisdiction for a court to award damages but that this course should be discretionary and that in reaching such decisions the courts should be directed to take into account, to the extent considered relevant, the conduct of the applicant.

One of the aspects of the section 8 provisions as to damages is the stipulation that the court should take into account the principles of the Strasbourg Court. In so far as this is code meaning that the level should be moderate, there is no quarrel with it. But whether such a prescription should remain in this form on the statute book in a UK Bill of Rights is more debatable. For it is uncertain whether the Strasbourg "principles", whose existence it posits, really exist at all. A very detailed report[39] by the Law Commission and Scottish Law Commission in 2000 revealed that there were no clear principles. Textbook writers have similarly concluded[40] that the search for principles at the Strasbourg Court in this respect is likely to be frustrating. On the other hand, domestic courts have developed principles for the award of such damages, most notably in *Anufrijeva*. In addition to the feature that damages

[37]Richard Clayton QC, "Damages under the Human Rights Act" [2005] JR 124.
[38][2004] QB 1124.
[39]"Damages under the Human Rights Act 1998", October 2000, Law Com 266, Scot Law Com 180.
[40]For example Grosz, Beatson & Duffy, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008), pp. 7-141.

are discretionary, the principles include that a balance should be struck between the interests of the victim and those of the public as a whole; and that damages are a last resort. I see no reason to criticise the case law which is thereby emerging and hope it will be carried forward to a UK Bill of Rights. Therefore, beyond a re-enactment of section 8(3) and the addition of a reference to responsibilities, it may be best to leave the quantification of damages to the courts to work out.

Balancing rights

The above discussion rejects the proposal that the Human Rights Act's version of damages be abolished, but does not address what may be regarded as the underlying concern in the submission quoted from the Society of Conservative Lawyers. That concern is about the assertion of novel rights in the field of public authority provision. The invention of new torts was surely not an intended purpose of the Human Rights Act. Rather than merely deny financial recompense, the better response must be to resist the supposed new duty being recognised in the first place.

One way to resist such speculative new duties may be to insist on the proportionality of rights. Canada offers an example of such a clause. Its Constitution Act 1982 begins:

> "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The Joint Committee on Human Rights draft Bill contains a clause entitled "Limitation of Rights" which sets out a more elaborate formula for "such reasonable limits, provided for by law, as can be demonstrably justified…"[41] There is in a sense a connection between the idea in such balancing clauses and the theme of the last Labour Government's approach to the rights-compatibility of terrorism measures, such as control orders, which was that rights should be re-interpreted, rather than repudiated or derogated from.

There is a case for some such balancing clause in any UK Bill of Rights. Since the concern arises principally in relation to the duty on public authorities, one possibility would be to confine the balancing provision to this part of the Bill. Whereas Canada's clause speaks in broad terms of "a free and democratic society," in a manner reminiscent of the Convention's repeated phrase "in a democratic society," it would be open to a UK Bill to refer more specifically to our own society. Bearing in mind that the existence of "our liberties" is a given to this Commission's terms of reference it might be reasonable to make the yardstick for reasonable balance the UK's specific heritage of rights and freedoms, rather than the more theoretical notion of a hypothetical democratic society.

[41] See clause 5 of the Joint Committee's draft Bill at annex H2.

Delegated legislation

The final topic arising in relation to section 6 is its impact on delegated legislation which is found to be in conflict with Convention rights. The Human Rights Act does not expressly say that such statutory instruments are not law. But section 4(2) limits availability of the declaration of incompatibility in respect of delegated legislation to cases where the primary legislation under which the subordinate legislation has been made prevents removal of the incompatibility, thereby implying that some other route must then be applicable. The implication of the Act is that any such order is made in breach of section 6. It has been found by courts that such orders are liable to be quashed.[42] No thought seems to have been given to statutory instruments which have been made by the affirmative resolution procedure, where the order has been made by a resolution of both Houses of Parliament. It is hard to reconcile a court quashing such subordinate legislation with the principle of the sovereignty of Parliament. Compatibility with the governing principle would be achieved if it were made clear that such statutory instruments cannot be simply quashed by a court.

Therefore, satisfactory provisions in a UK Bill of Rights could be:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a constitutional right.
>
> (2) Subsection (1) does not apply,
>
> (a) if as the result of primary or subordinate legislation the authority could not have acted differently, or the authority was acting to give effect to primary or subordinate legislation;
>
> (b) to the extent that the authority's act or omission was reasonably justified by the standards of the UK's heritage of rights and freedoms.
>
> (3) No remedy other than a declaration of incompatibility shall be available in respect of subordinate legislation which has been made by resolution of Parliament.
>
> (4) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, the Administrative Court, or a court on appeal therefrom may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
>
> (5) No award of damages is to be made unless, taking account of all the circumstances of the case, including –
>
> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

[42] See for example, *R (C (A Minor)) v. Secretary of State for Justice* [2009] QB 657.

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(6) In considering the exercise of its discretion whether to grant damages or any other relief the court shall take into account, to the extent that it considers relevant, whether the applicant has discharged his responsibilities."

Ministerial statements

Section 19 of the Human Rights Act provides:

"(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill –

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (a statement of compatibility); or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate."

The view has been expressed to us that this seemingly minor provision has, in fact, had a greater beneficial impact than any other in the 1998 Act, since it has led to practices within Government departments of considering the rights implications of all draft legislation before it is presented to Parliament. We have received no criticism of this provision. Therefore, I would envisage that a UK Bill of Rights should have an identically worded provision be included, with the modification only that it would refer to "constitutional rights."